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Issue Date: 09 January 2003

Joseph H. McGovern
Claimant

2001-LHC-01297

v.

W.F. Magann Corporation
Employer

and

Signal Administration
c/o Abercrombie, Simmons & Gillette
Carrier

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§ 901, et seq., (the "Act"), and the regulations promulgated thereunder. A hearing was held on May 22, 2002 in Orlando, Florida. Joseph H. McGovern, the Claimant, was represented by John M. Schwartz, Esquire, Blumenthal, Schwartz, Garfinkel & Mantia, P.A., of Titusville, Florida. The Employer/Carrier is represented by Donovan A. Roper, Esquire, Roper & Roper, P.A., of Altamonte Springs, Florida.

At hearing, nine (9) administrative law judge exhibits, marked as ALJ 1-9, were admitted into evidence (Tr. 7). The Claimant offered ten (10) exhibits (hereinafter referred to as "CX" 1-10), and the Employer/Carrier offered nineteen (19) exhibits (hereinafter "EX" 1-10, 15-20 and 22-24). All of these were entered into evidence. The Claimant testified at hearing. Live testimony was presented on behalf of the Employer by William Stanley Magann, Jr., a co-owner of W.F. Magann and a direct supervisor of Mr. McGovern. After the receipt of the Hearing Transcript, both parties filed briefs.

Issues

On May 11, 2000, the Claimant was injured in a compensable accident when he sustained a crush and laceration injury to his right thumb. The Claimant has raised the following issues:

1. Proper determination of average weekly wage and compensation rate;
2. Claimant's right to a first choice of physician;
3. Interest on back temporary total disability benefits;
4. Compensability of arm and shoulder; and
5. Entitlement to further impairment benefits, temporary total/temporary partial benefits, loss of earnings and earning capacity.

The Employer responded to the Claimant's claims as follows:

1. Claimant's average weekly wage and compensation rate were correctly calculated pursuant to § 10(a) of the Act – calculation correctly included concurrent earnings

from Claimant's employment at Baker Concrete Construction Co., during the 52 weeks prior to May 11, 2000 since Claimant worked "substantially the whole of the year immediately preceding his injury" for W.F. Magann and/or Baker Concrete.

2. The Claimant, himself, selected Dr. William Myers as his voluntary, first choice treating physician for his right thumb injury, as evidenced by LS-203 which was hand written and signed by Claimant on June 25, 2000, after the initial emergency treatment at the Port Orange Urgent Care Center.
3. Based upon Claimant's complaints to his physicians and the vast body of medical evidence in the record, it is clear that the compensable right thumb injury is neither causally related to, nor did it causally aggravate/exacerbate, either a neck, back or shoulder condition(s). Moreover, any and all such conditions either pre-existed the May 11, 2000 industrial accident or came about well after said industrial accident.
4. The Employer timely paid a § 8(c)(6) scheduled injury, partial permanent disability, in the amount of $525.29 as a result of Dr. Myers' 3% thumb injury rating. The Employer/Carrier has no further exposure to workers' compensation liability for loss of wage earning capacity due to Claimant's scheduled right thumb injury.
5. Pursuant to Section 28 of the Act, Claimant has no entitlement to attorney's fees, costs, interest and penalties in the event that the Employer prevails at formal hearing on the aforesaid issues; or in the alternative, the Claimant has no entitlement to recoupment of the same for issues not raised at Informal Conference and/or agreed upon by the Employer/Carrier following the Informal Conference.

The following stipulations were agreed upon by the parties:

- Jurisdiction is proper (Tr. 13; ALJ 3; ALJ 4).
- The date of Claimant's injury was May 11, 2000 (Tr. 13).
- The injury occurred within the course and scope of employment (Id.).
- The claim was filed in timely a fashion (Id.).
- The Employer, W.F. Magann, is properly named (Id.).
- Claimant's thumb injury is compensable under the Act (ALJ 4).
- Medical benefits have been paid in the amount of $3,120.59 (Tr. 15).
- Temporary total disability benefits were paid for the period of May 26, 2000 through July 9, 2000 (Tr. 16; ALJ 4).
- Permanent partial disability benefits have been paid for the injury to the thumb (Id).

After a review of all the evidence, I find that the matters set forth above are substantiated by the record.

Factual Background

Claimant testified that he was born on March 19, 1953, received a high school diploma and has vocational training in carpenter apprentice and scaffold erecting (Tr. 27). In his deposition, Claimant testified that he is an OSHA-approved scaffold maker (EX 17). By trade, Claimant is a carpenter and has been employed in such capacity throughout the years.[1] Moreover, Claimant

[1] Prior to working for Baker Concrete, Claimant worked as a carpenter for Buena Vista Construction Company (Tr. 40).

testified to being a member of the Carpenters and Lathers Local 1765 Union for the past fifteen (15) years (Tr. 85-86). Prior to his employment with W.F. Magann, Claimant did concrete work for Baker Concrete Construction[2] from May, 1998 until October 20, 1999 (Tr. 39-40). Thereafter, Claimant collected unemployment benefits while looking for work from October, 1999 through March of 2000 (Tr. 39).

Claimant began working for the Employer, W.F. Magann, on March 27, 2000 (Tr. 28). In his deposition, Claimant stated that he worked as a pile driver, driving sheet pilings for Crawford Dam sixty (60) feet out from shore to stop erosion for Lighthouse Point (Ex 17). At hearing, Claimant described his job as mostly a signaling job – "I signal the crane operator, line everything up visually and then signal to the crane operator" (Tr. 59). Claimant further testified that the job did not involve much labor intensive work (Id.). Claimant was temporarily laid off on May 26, 2000, but was rehired in the same capacity in mid-July of 2000 (Tr. 61). Claimant was permanently laid off by the Employer on December 21, 2000 because the project was completed (Tr. 62).

At the time of hearing, Claimant was not working, and last worked in June of 2001 when he was laid off from Peninsula Engineering Construction due to a lack of work force (Tr. 28, 70). During the time he spent working for Peninsula (April, 2000 through June 26, 2001), Claimant erected scaffolding for pipefitters (Tr. 70). Specifically, Claimant testified that he directed and designed construction scaffolds on rocket pads at Cape Canaveral (Id.). This required him to climb around the scaffolding in a full-body harness up to 300-400 feet in the air, hooking off and reaching up to construct scaffolds (Id.).

Testimonial Evidence

At hearing, testimony was received from two (2) witnesses – the Claimant, who took the stand first, followed by William Magann, Jr., a co-owner of W.F. Magann. Deposition testimony was offered from Kraig Breaux, an insurance adjuster.

Joseph H. McGovern

The Claimant testified regarding the events surrounding his May 11, 2000 work accident, as well as his medical and employment histories and current medical condition. The Claimant testified that, on May 11, 2000, he suffered a crush injury to his right thumb while working for the Employer. Specifically, Claimant testified that "we were rigging an I-beam ... with the crane, both ends with a hook and a cable, and the I-beam wasn't level. I had the high end and as the operator lifted up, it -- the cable slacked and the cable whipped and the hook slid over and smashed my thumb between the I-beam and the hook" (Tr. 29). Claimant further testified that he was wearing a glove, and [when he removed the glove from his right hand] "the end of the thumb was in the glove, completely separated" (Tr. 30). According to Claimant, he was sent to an ambulatory care facility in Port Orange and then to the "real" emergency room at Halifax Hospital. At Halifax emergency room, Dr. Myers was called in[3] and prepped the Claimant for surgery, and thereafter,

[2] Claimant's work included forming slabs, laying out walls and pouring concrete walls (EX 17).

[3] On direct, Claimant was asked how he ended up with Dr. Myers to which he responded "[h]e was in the emergency room" (Tr. 30).

performed the surgery to repair Claimant's right thumb (Id.). Claimant testified that he returned to work the very next day (Tr. 31). And although his hand hurt and was in a sling, he worked light-duty, standing around, every day, for a two (2) week period before being laid off (Id.).

On direct examination, Claimant testified that he returned to see Dr. Myers over a period of time for treatment, approximately eight (8) or ten (10) visits (Tr. 30-31). Furthermore, Mr. McGovern stated that Dr. Myers sent him to occupational therapy for his thumb (Tr. 31).

Claimant testified that he had problems with his shoulder prior to the time of his industrial accident (Tr. 41). However, after the injury to his right thumb, Claimant testified that his shoulder got worse. Specifically, Claimant stated that "I had bursitis before this, but from the jerk of -- getting pinched and
-- I believe just from sleeping, sitting up for six (6) weeks, that my shoulder just continuously was getting worse and worse" (Tr. 32). Claimant testified that he told Dr. Myers about his shoulder, but Dr. Myers didn't do anything and said it would probably go away (Tr. 32-33). When asked why Dr. Myers records are completely devoid of any reference to pain, symptoms or complaints regarding the shoulder, Claimant responded that he has no idea why there is nothing of record (Tr. 73). Claimant describes the pain as being different when comparing the condition of his shoulder before and after the May 11, 2000 accident (Tr. 42). According to Mr. McGovern, the pain is now more in the muscle or in the back and neck and there is numbness and tingling in the fingers (Id.). Claimant further offered that "it's a different kind of pain. It's in the muscles in the inside -- it's not in the -- it's not the bursitis. It's not the sharp pain, it's the dull and it restrict the movement. I can't -- I don't have good movement. I can't reach and it has no strength. It's deteriorating as I'm sitting here, and it's just getting harder and harder to work" (Tr. 102-103).

When asked about any previous injuries at hearing, Claimant testified that he could not remember most of the recorded injuries. Such testimony went as follows:

> Q. Tell us about the October 26, 1997 incident in which your right shoulder was injured as a result of a falling tree. What happened there?
> A. I don't remember that one.
> Q. Did you visit Dr. Jaramillo on October 29, 1997 and complain of numbness and pain behind your right shoulder and upper arm, as well as your low back and upper arm after a tree fell and landed on your shoulder the previous Saturday? Does that ring a bell?
> A. No, it doesn't.
> Q. Do you remember July 7, 1998, bilateral, both shoulders, work injury at the Disney Yacht and Beach Club?
> A. No.
> Q. You don't remember straining or hurting your shoulders, both your shoulders when working out at Disney?
> A. No.
> Q. Do you remember going to see Dr. Jaramillo to complain about a bilateral shoulder injury at Disney, in July of 1998?
> A. I don't remember.
> Q. Do you remember complaining of abdominal pain along with the shoulder complaints, nervousness, anxiety and muscle spasms in your low back following that Disney injury?
> A. No, I don't remember that specifically, no.

Q. Do you remember complaining and incurring a right shoulder bursitis condition and low back complaints in September of 1999?
A. Like I say, I don't remember, but, you know --
Q. For the process of expediting this whole thing. Would you disagree with Dr. Jaramillo's records --
A. No, I --
Q. -- that showed you were treated for right shoulder bursitis and low back pain complaints in September 3, 1999?
A. Probably not.
Q. Were you assaulted on March 6th of 2000 in the Auto Nation parking lot? Mugged?
A. Yes.
Q. Now, this is about two months prior to the accident we are here on today? Is that correct?
A. If you say like -- I'm -- I'm not sure.
Q. In fact, two months and a couple days to the date prior to our accident. You were assaulted and your wallet was stolen.
A. Yes.
Q. And you had $3,000 in cash in that wallet, right?
A. A large sum of money.
Q. You got a couple of black eyes because of that incident?
A. No.
Q. Explain to the Court what happened? You were assaulted and mugged by these two women.
A. What was the date on that?
Q. March 6th, 2000. Auto Nation parking lot.
A. I don't -- I really can't remember right now.
Q. You can't remember what that was about?
A. No, not right now, I can't.
Q. You don't recall being mugged?
A. No.
(Tr. 87, 88, 91, 95, 96)

The record reflects that on March 6, 2000 the Claimant reported to Dr. Jaramillo, his treating internist, that he was mugged at Auto Nation by two (2) women who kicked him, stepped on him, hit him with a baseball bat and lung wrench then robbed him of his wallet, money, keys, but not his car (EX 2).

Claimant did testify that he remembered falling down in the bath tub and injuring his left shoulder, neck and right ribs, which resulted in him being treated at the Central Florida Regional Hospital ER (Tr. 91). Claimant also testified to remembering being involved in a motor vehicle accident on June 21, 2000 to which he did not sustain any injuries (Tr. 92). Claimant affirmatively testified to being involved in a roll-over accident on June 8, 2000 wherein two vehicles, which were drag racing over a bridge, forced Claimant's vehicle off the road causing him roll over and slide into the river (Tr. 92-93). Claimant was able to extricate himself from the car (Tr. 93). Thereafter, he was treated for injuries to his lumbar, low back, left arm and right hand (Tr. 94).

Claimant testified that he filed an LS-203 with the Department of Labor in order to get workers' compensation – "was laid off and I couldn't get another job, I was hurt. I didn't think I was able to work" (Tr. 33-34). On cross-examination, Claimant testified that he signed and dated the LS-203 on June 25, 2000 (Tr. 45). Claimant further testified that he recognized the LS-203 and read the language at the bottom of the document before signing it (Id.).

Claimant testified that he read and checked off "Yes" for paragraph 26 of the LS-203, which asks whether he had received medical attention for the injury (Tr. 46). Additionally, Claimant he, personally, filled in Dr. W. J. Myers, Halifax Hospital ER, 303 North Clyde Morris Boulevard, Daytona Beach, Florida and that he completed the form in his own handwriting (Id.).

Claimant acknowledged that he checked off "Yes" for Section 27 of the LS-203, which asks whether he received his first choice of physician (Tr. 34). When asked to explain the inconsistent positions he has taken in this claim, Claimant stated that at the time he completed the form, "I really didn't understand that. I just -- I believed like did I get a doctor, yes, I had a doctor, but it wasn't of my choice" (Id.). Claimant was directly asked if he ever chose Dr. Myers to which he responded, "[n]o, I didn't. [I was] dissatisfied with Dr. Myers because of shoulder pain and he just didn't seem very concerned about it and he thought it would go away, but it was getting worse" (Tr. 35).

When shown his earnings records from his employment with Baker Concrete Construction Company, Claimant did not take any issue with the hours or the amounts for those time periods (Tr. 98). Claimant also had no objection to or problem with his earnings for his periods of employment with W.F. Magann (Tr. 100).

William Stanley Magann, Jr.

At hearing, the Employer called William Stanley Magann, Jr. to testify on its behalf. Mr. Magann is a co-owner of W.F. Magann (Tr. 107). Mr. Magann testified that he was one of Mr. McGovern's direct supervisors at the Ponds Inlet jetty project where Claimant was injured (Tr. 106). On direct examination, Mr. Magann could recall the fact that the Claimant was injured on May 11, 2000 (Tr. 108). Mr. Magann stated that he was present when the Claimant was hurt and as a result, his supervisor sent Mr. McGovern to the clinic which thereafter sent him to Dr. Myers (Tr. 118). Mr. Magann was unable to recall Mr. McGovern ever complaining – either in his presence or overhearing him – about something other than his right thumb pain (Tr. 108). Specifically, Mr. Magann testified that he never heard him (Claimant) complain about shoulder pain, neck pain or low back pain (Tr. 108-109).

Mr. Magann described Claimant's duties as a pile driver as follows:

> [h]e signals the crane to bring it into the proper spot. He then visually coordinates with the operator where to put the pile, has a laborer with him at all times to help interlock that connects the entire wall. It's then threaded down. He is there while the laborer and the release of the shackles. They then attach the crane to a pile driver -- it's a vibratory hammer, which you have another operator who controls that operation. So he then signals both and coordinates the two, the operator of the pile driver and the operator of the crane to attach to the pile and then turning on the pile driver, vibrates the sheet down into the sand, and while it's being vibrated, he uses a level to align it and make sure it's

> plumb, and then drives it down to grade, shuts off the machine and then goes on to the next one in a repetition process.

(Tr. 109-110). When asked about the physical nature of Claimant's job, Mr. Magann testified that "it is not a physically intensive job – it's merely a job of directing the crane operator, the pile driver operator and the laborer" (Tr. 110).

Mr. Magann further related that Claimant's thumb injury did not prevent him from doing his job. According to Mr. Magann, Claimant returned to work the next day and worked consistently until May 26th which was the day that phase of the construction projected ended (Tr. 111).

Mr. Magann next testified that the Claimant was rehired in the same capacity (pile driver) in July of 2000 (Tr. 111). Claimant remained employed as a pile driver (and as an assistant pile driver at some point) through December 21, 2000 (Tr. 112). Mr. Magann testified that the second phase of the project ended on December 21, 2000. Mr. Magann further testified that, for the third phase, W.F. Magann employed a more experienced pile driver at the same rate that it paid the Claimant (Tr. 113). Furthermore, Mr. Magann stated that the Employer did not have any other available work for the Claimant as of December 21, 2000 – not other than pile driving and they only needed one (pile driver) (Tr. 113-114).

Mr. Magann testified that Claimant would be considered an inexperienced pile driver because he doesn't believe that Mr. McGovern had ever been a true pile driving foreman. In addition, Mr. Magann stated that "[t]he superintendent, who was on the job was a very experienced, -- and had been a pile driver himself a many years -- basically instructed Mr. McGovern and myself (I was the assistant superintendent at the time) in the ways of pile driving, and thus made him able to do his job." (Tr. 111-112).

On cross-examination, Mr. Magann was questioned about the Claimant's condition and status at work on the day following the work accident. Mr. Magann testified that "he (Mr. McGovern) didn't tell us that the doctor had told him not to go back to work. We didn't check with the doctor. That's his (Claimant's) discretion. That's his doctor" (Tr. 117). Mr. Magann further stated that it was Mr. McGovern's decision to return to work during the time Dr. Myers put him on no work – "Claimant had his sling with us and he had determined that he wanted to be at work" (Tr. 116-117). Mr. Magann also testified that Mr. McGovern told him that he wanted to return to work.

Mr. Magann offered that Claimant was a pretty good worker and showed some loyalty to the company by coming back to work after Dr. Myers advised him not to work (Tr. 117). However, Mr. Magann did testify that he began having attendance problems with the Claimant after he was rehired in July of 2000. More specifically, "as it was getting closer to December, we started having more and more attendance problems with Mr. McGovern" – towards December 21, 2000, Mr. McGovern began showing up less and less (Tr. 123).

Mr. Magann, on cross-examination, reiterated the fact that the Claimant never told him about any shoulder and back problems that he may have had before the subject injury (Tr. 118).

Mr. Kraig Breaux, a Claims Manager for Abercrombie, Simmons & Gillette, offered deposition testimony on April 9, 2002. Prior to joining Abercrombie, Mr. Breaux was an adjuster for Hartford Insurance Company where he specialized in multi-lines. Before becoming a claims manager, Mr. Breaux was hired to work as an adjuster for the Carrier, handling multi-line claims solely in the longshore area. Mr. Breaux additionally testified that he was comfortable in saying that "I'm a Longshore expert" (CX 10, EX 18).

Mr. Breaux stated that he is familiar with Mr. McGovern's case since it was transferred to him on July 20, 2000 – he is the 2nd adjuster to have been assigned to the case. From Mr. Breaux's point of view, there are no questions as to the compensability of Claimant's right thumb – medical bills and impairment benefits have been paid for it. However, the Carrier does not accept compensability for the shoulder or any other body part (CX 10, EX 18).

According to Mr. Breaux, Claimant's average weekly wage at the time of the injury to be $345.64 with a Compensation Rate of $230.43. This was determined from Mr. McGovern's earnings with W.F. Magann and Baker Concrete Construction Company from the 52-week period that preceded the subject injury. Mr. Breaux testified that the Claimant, in the 52 weeks that preceded his injury, worked 21 weeks for Baker and 11 or 12 weeks for W.F. Magann. Originally, Claimant's average weekly wage was calculated to be $152.31 based on his earnings from W.F. Magann ($7,920.50 in the 52-weeks that preceded his work injury). However, once the Carrier was made aware of Claimant's additional earnings ($10,052.78 from Baker Construction) in the 52-weeks that preceded his injury, Claimant's average weekly wage increased to $345.64. Mr. Breaux testified that he determined the average weekly wage by taking the earnings total and dividing it by 52 (CX 10, EX 18).

In further questioning of Mr. Breaux as to his method of calculating Mr. McGovern's average weekly wage, he was asked whether he looked for a similar employee at Magann to which he responded no. Mr. Breaux explained that they "had no similar employee, and he (Claimant) was capable of working 52 weeks", and in addition, "he didn't provide any verification that he was on unemployment benefits, that he was excused from a doctor" (CX 10, EX 18).

It was Mr. Breaux's understanding that Dr. Myers was Claimant's treating doctor for his thumb injury. Mr. Breaux further testified that Claimant's other treating doctors were Julie Bonamo, an occupational therapist, and Dr. Hung Doan, who treated Mr. McGovern at the Port Orange Urgent Care Center (CX 10, EX 18).

Mr. Breaux testified that Claimant was paid temporary total benefits ("TTD") from May 26, 2000 to July 9, 2000 at a rate of $152.31. Mr. Breaux further testified that he did not pay benefits for time preceding May 26, 2000 because the Claimant returned to work the day following the injury and worked continuously through May 26, 2000 until he was laid off. For the period of May 26, 2000 through July 9, 2000, the Claimant was also paid $979.14 for back TTD amounts to make up the difference in the average weekly wage calculations. This amount was paid on September 27, 2000.
$230.43. Mr. Breaux stated that he did not pay interest on the back pay because it is Claimant's obligation to provide the Employer with any additional earnings he may have, and that was requested from him. Claimant was not paid temporary total disability benefits for the time

subsequent to July 9, 2000 because the Claimant was released by Dr. Myers to return to work as of June 5, 2000 (CX 10, EX 18).

Mr. Breaux further testified that it was his understanding that Mr. McGovern reached maximum medical improvement on October 4, 2000, with a three percent (3%) rating of the thumb. According to Mr. Breaux, the Carrier has paid out that rating in the amount of $518.47[4] (CX 10, EX 18).

Mr. Breaux testified that Dr. Myers was the Claimant's first choice of physician. When asked how Claimant exercised that first choice physician, Mr. Breaux stated that he "really didn't know since I wasn't there at the time. Mr. McGovern went to Dr. Myers on his own." Mr. Breaux further testified that he never sent the Claimant any correspondence pertaining to his first choice physician (CX 10, EX 18).

Mr. Breaux affirmed that he submitted the following documents to the Department of Labor – LS-208, dated February 8, 2001; an LS-202; a LS-206 confirming the date temporary total or permanent partial disability benefits commence; and two (2) LS-207s. In its initial LS-207, dated October 2, 2000, the Employer controverts the Claimant's need for medical care for his shoulder and/or back. As for its subsequent LS-207, dated February 8, 2001, the Employer controverts the alleged back and shoulder, the Claimant receiving a second free choice physician and the payment of interest on appropriate total temporary disability benefits (CX 10, EX 18).

Speaking to the issue of total temporary disability benefits ("TTD"), Mr. Breaux testified that all of these benefits were paid on time. Mr. Breaux did testify that he paid the Claimant for back TTD benefits in the amount of $979.14 on September 27, 2000. However, Mr. Breaux stated that he did not pay interest on that because it is Claimant's obligation to get additional earnings he may have, and these were requested from him (CX 10, EX 18).

As for additional benefits, Mr. Breaux testified that he denied Claimant's request for benefits in order for a physician to treat his shoulder. Additionally, Mr. Breaux denied Claimant's request for further temporary total disability benefits, as well as interest payments. Mr. Breaux reasoned that since Mr. McGovern worked through maximum medical improvement, "I didn't owe any additional benefits" (CX 10, EX 18).

Mr. Breaux also testified that, at the informal conference, Claimant's authorization request for treatment with Dr. Werntz was denied because this would be Mr. McGovern's second requested physician (CX 10, EX 18).

Medical Evidence

Immediately following the work injury, Claimant was taken to Port Orange Urgent Care Center, Emergency Department for treatment (Tr. 30). Under the care of Dr. Hung Doan, Claimant was given antibiotics IM and a tetanus shot (EX 1). A severe nailbed laceration and moderate bone

[4] This figure was determined as follows: 3% of the thumb equates to 2.25 weeks of Compensation at the established Compensation Rate of $230.43, calculates to a total permanent partial disability/scheduled award in the amount of $518.47 (CX 10, EX 18).

visibility were also noted (EX 1, EX 5). X-rays were taken which revealed a comminuted fracture of the distal phalanx of the thumb (EX 3, EX 5). Thereafter, Claimant was transferred to Halifax Medical Center for definitive care (Id.).

William J. Myers, M.D.

At Halifax, Claimant's thumb was irrigated with saline solution and debrided in the emergency room (EX 1). Mr. McGovern's right thumb and nail bed were repaired by Dr. William J. Myers (EX 1, EX 3, EX 5). Under the care of Dr. William J. Myers, the nail bed was repaired with a 6-0 chromic interrupted simple stitch. Dr. Myers then repaired the laceration on the radial side of the finger near the nail fold, with a single 4-0 nylon in horizontal mattress fashion. A proximal thickness nail graft was performed to patch the missing nail bed. A piece of foil from the suture package was fashioned as a nail plate and placed under the nail fold, held in the radial and ulnar corner with a 4-0 nylon and distal tip with a 4-0 nylon. Several holes were placed into the foil to allow drainage. Following treatment, Claimant was discharged with instructions to ice and elevate the right upper extremity for 48 hours and as needed, continue with all previous diet and medications. Dr. Myers further instructed Mr. McGovern to clean the thumb with peroxide daily and dry dressing starting the next day. Dr. Myers prescribed Keflex and Vicodin and instructed Mr. McGovern to follow-up in about one (1) week post-injury at the office. Lastly, Dr. Myers placed Claimant on a no work category until further evaluation (EX 3).

The Claimant sought follow-up treatment with Dr. Myers on May 19, 2000. According to a new patient questionnaire, Mr. McGoven provided that he was referred to the office by the Emergency Room at Halifax Medical Center. Under the medical history portion, Claimant provided that he suffered previous injuries to his ribs, back and neck and was currently taking the following medications: aspirin, prilosec, soma, oxycontin, vicodin and valium. Additionally, Claimant reported that he had a hernia and suffered from bursitis in this shoulders (EX 1). Upon examination, Dr. Myers noted that Claimant showed about 0-30° a IP motion. It was further noted that the thumb was certainly swollen, with the areas granulating in well. The capillary refill was good throughout the fingers. Claimant had the stitches removed. Dr. Myers reviewed the x-rays with Mr. McGovern, who was advised that everything was healing acceptably. When Claimant questioned about the shape of the thumb, Dr. Myers opined that it was certainly bulbous and swelling secondary to the crushing and swelling, but "it will come down over time (6-8 months possibly)". Claimant was instructed not to work and to return in a week (EX 16).

Dr. Myers next examined the Claimant on June 5, 2000. He noted that Claimant's right thumb was healing well. Dr. Myers further noted that Mr. McGovern had about one (1) mm of nail outgrowth and the skin was healing well, despite being somewhat bulbous and swollen, which was expected. Dr. Myers reported that Claimant's nail-bed appeared to be fully intact and the graft had taken well. Moreover, Claimant showed 0–36° IP motion. In his report, Dr. Myers noted that he put Claimant in a no work category from May 11, 2000 to June 5, 2000 and again restricted him from work as of his last visit, May 19, 2000. However, the record relates that the Claimant apparently had returned to work, light duty, but he was released, "as they had no light duty available". As of his June 5, 2000 examination, Dr. Myers placed the Claimant on light duty, restricting him to lifting five (5) to ten (10) pounds with the right hand. However, Dr. Myers noted that, if this (light duty) was not available, then he could not work. Dr. Myers reported that he would send the Claimant to occupational therapy for scar control, range of motion, active and passive, swelling control and strengthening. Claimant was instructed to massage his skin with lotion and pull the tissues away from the nail fold, to avoid in-growth, and to follow-up in four (4) weeks (CX 2, EX 1, EX 16).

Claimant apparently had a follow-up orthopedic exam on June 30, 2000. However, Dr. Myers noted that Mr. McGovern was not capable of making it due to apparent car trouble. Claimant's follow-up appointment took place on July 5, 2000, when Dr. Myers reported that the thumb showed about a two (2) mm nail outgrowth and the nail bed graft appeared to have completely fused. Neither erythema nor drainage were noted. Claimant displayed a range of motion of the IP joint of the right thumb from 0-50° compared to the opposite of 0-65°. Dr. Myers also noticed good capillary refill throughout the fingers. Dr. Myers plan was to keep Mr. McGovern on light duty lifting in the 5-10 pound range, and if there was no light duty, then he was to remain in a no work category. Dr. Myers recommended that Claimant begin desensitizing and promoting dexterity by picking several small objects, stacking pennies, putting paper clips into a cup and bringing them out again, as these small things might improve it and sensitize the tip. Claimant was instructed to continue with therapy, continue rubbing it and massaging it, and follow-up in four (4) weeks, at which time we will consider advancing him to medium level activities (EX 16).

On July 7, 2000, Claimant called Dr. Myers office, requested that he call him. When Dr. Myers returned the call, Claimant stated that he was on light duty with his job, but was happy with working and that it was important that he work. Claimant further stated that he was keeping it at light duty until the thumb heels a little bit more and then it should be acceptable (EX 16).

Claimant next treated with Dr. Myers on August 2, 2000. Upon exam, Claimant was able to give a 55° IP motion, with a little puckering of the skin at the tip of the thumb soft tissue from the crush. Dr. Myers noted that the nail was outgrowing about 40% grown out, but there was a little bit of elevation of the skin radially and ulnarly which may cause some potential ingrowing. There was no erythema, no redness, and no evidence of infection, but good capillary refill throughout the skin. Dr. Myers opined that Claimant was not at maximum medical improvement and would probably not reach MMI for at least another 3-5 months, because it was going to take time for the nail to outgrow. Dr. Myers placed Claimant on full duty, with the restriction from activities that put a lot of pressure on the tip of the thumb.
Claimant was instructed on how to massage the skin fold away from the nail and to return on a 6-8 week basis unless he gets some ingrowing of the nail or has problems such as redness, swelling, drainage or the like (EX 16).

Claimant was scheduled for a follow-up examination on September 27, 2000. However, Dr. Myers reported that Claimant failed to show up for the exam (EX 16).

During Dr. Myers' October 4, 2000 examination of Claimant, Mr. McGovern stated that the thumb was a little sensitive when he bangs it. Upon examination, Dr. Myers noted that the nail was growing out, although Claimant does show a significantly ragged edge, more toward the radial side. A scar on the tip of the thumb pulp was noted. Claimant's range of motion was IP 0-37°, MP 0-60° flexion, and he shows good capillary refill throughout the tip. As far as treatment was concerned, Dr. Myers reported that no further medications and therapy were recommended. Claimant was advised to keep trimming the nail back in order to try and preserve as much as possible. Dr. Myers concluded his report by opining that Claimant had reached maximum medical improvement with a one percent (1%) whole person impairment rating and a three percent (3%) impairment rating of the thumb (EX 1, EX 16).

In addition to his medical records, Dr. Myers offered deposition testimony on November 12, 2001. Dr. Myers testified that he is board certified in orthopedics and has an added a certificate of qualifications in hand surgery. Furthermore, Dr. Myers stated that he has been specializing in hand surgery since 1988 (EX 19). Dr. Myers testified that he first saw the Claimant on May 11, 2000 when he was called in by the emergency room doctor. Upon examining Claimant on that date, Dr. Myers stated that he diagnosed Mr. McGovern as having a severely comminuted fracture of the distal phalanx of the right thumb with a severe nail bed laceration and open wound. According to Dr. Myers, Claimant's treatment included: irrigation and debridement in the emergency room, followed by a repair of the nailbed and soft tissues as much as possible which required Dr. Myers to create a graft for the missing portion of Claimant's nailbed. Thereafter, Dr. Myers testified that he recommended that Claimant ice and elevate for 48 hours; take antibiotics and analgesics; clean with peroxide; and follow-up within a week for a repeat examination (EX 19).

Dr. Myers testified to have last treated Mr. McGovern on October 4, 2000. At such time, Dr. Myers "put him (Claimant) at full-duty without restrictions." Dr. Myers further stated that he has not taken Claimant off full-duty or no restriction status, and has not seen him since the October 4th visit. Additionally, Dr. Myers, as of the last exam, provided that he did not find any need for further surgery; but did discuss with Claimant about a procedure if any problems developed. Lastly, Dr. Myers testified that "with the resolution of the [thumb] injury, Claimant can return to those activities -- full-time and full-duty to his job as a pile driver (EX 19).

When questioned about Claimant's permanent impairment rating, Dr. Myers testified, in his deposition, that the sensation was not impaired, so no impairment was related to the sensation. Dr. Myers further testified that the IP and MP joints were the ones involved so they were the ones rated (The CMC joint was not involved in the injury). In justifying Claimant's rating, Dr. Myers testified to the following: Claimant's IP motion was at 0-37 which became a 3% impairment; his MP motion was 0-60° which was a 0% impairment; the 3% of the thumb was then controverted to 1% of the hand and that became 1% of the upper extremity which became 1% of the whole person which is as per the American Medical Association Guides (EX 19).

When questioned about the relationship between Claimant's thumb injury and his alleged shoulder, neck and back injuries, Dr. Myers testified that "I did not have any listed complaints of right or left shoulder pain. [And] from memory and my records, I addressed his thumb injury, but I did not have any complaints of shoulder injury relative to thumb injury." Additionally, Dr. Myers offered that he "did not receive [from Claimant] any complaints of any neck and shoulder pains" and "no complaints of neck pain relative to the hand injury." Dr. Myers further testified that the "only complaints I ever obtained from Claimant concerning the May 11, 2000 injury was relative to his right thumb. No other complaints to any other areas." Lastly, Dr. Myers concluded that the "accident did not affect any other part of his (Claimant's) body from what I was aware of" (EX 19).

As for Claimant's previous medical conditions, Dr. Myers testified that the "only information I have is what was listed on his information sheet when he came in the office." Dr. Myers stated that "Claimant did list that he had rib, back and neck problems which he was seen at the emergency room in Sanford, Florida for, but I don't have any specific information other than that." Dr. Myers added that "he (Claimant) did list in his medical problems as having bursitis of

the shoulders." When further questioned about Claimant's previous injuries, Dr. Myers added that there was "no listing of leg or low back injury as a result of being struck by a gator tail" (EX 19).

Julie Bonamo

While Claimant was treating with Dr. Myers, he also began therapy with Julie Bonamo, an Occupational Therapist. Mr. McGovern first saw Ms. Bonamo on June 29, 2000. In her report, Ms. Bonamo noted that Claimant was referred to the Daytona Beach Hand Clinic for range of motion, scar management, edema management and strengthening of the right thumb and hand. Upon exam, Ms. Bonamo reported: good healing and wound skin coverage of the wound area, the nail bed looks good and seems to have a little bit of nail coming in; moderate amount of edema in the thumb; and moderate hypersensitive to the scar. Ms. Bonamo recommended that Mr. McGovern be seen two (2) times a week for active and passive range of motion exercises of the right thumb, scar management and edema management and to begin a strengthening program for the right upper extremity. Lastly, the Claimant was instructed in a home exercise program for active and passive range of motion, Coban wrapping and scar massage to help with edema and scar sensitivity (EX 6).

Claimant treated with Ms. Bonamo throughout of the month of July, 2000. In her progress notes, Ms. Bonamo noted that Mr. McGovern's grip and pinch strength were both improving, as well as the range of motion for his thumb. During the July 27th visit, Claimant told Ms. Bonamo that "my thumb is coming along pretty good"(EX 6).

Claimant's final treatment with Ms. Bonamo took place on August 1, 2000. Therein, Ms. Bonamo reported that the Claimant had been doing very well. It was further reported that the range of motion and strength of his right thumb have both continued to improve. Ms. Bonamo noted that Claimant was able to perform work duties and ADL's. Claimant was instructed to continue with the home exercise program.

Leonides B. Jaramillo, M.D.

Dr. Leonides Jaramillo is an internal medicine physician who has special licensing in gastroenterology (EX 20). Dr. Jaramillo began treating the Claimant on July 14, 1994 when Mr. McGovern presented complaints of abdominal discomfort, indigestion and anxiety. Dr. Jaramillo diagnosed Claimant as having reflex esophagitis, stress, anxiety for which he prescribed valium and Tagamet (EX 2).

Needing a refill of prescription, Claimant next treated with Dr. Jaramillo on July 28, 1994. In his diagnosis, Dr. Jaramillo noted that Claimant suffered an injury his left eyebrow as a result of a car accident, while still having trouble with reflux esophagitis (EX 2).

Claimant treated twice with Dr. Jaramillo in 1995. During the June 23, 1995 visit, Claimant was diagnosed with abdominal pain, insomnia and stress. Claimant again complained of abdominal pain during his August 24, 1995 visit to which he was prescribed Valium (EX 2).

Claimant did not treat with Dr. Jaramillo again until March 12, 1997 when Mr. McGovern presented complaints of abdominal tenderness and no appetite. Dr. Jaramillo noted that Claimant appeared to have muscular emaciation and prescribed Valium (EX 2).

On his April 2, 1997 visit with Dr. Jaramillo, Claimant complained of having a lot of pain as a result of being hit in the back of the legs and calfs by an alligator tail. Dr. Jaramillo prescribed Valium and Demerol (EX 2).

At the recommendation of Dr. Jaramillo, Claimant underwent a polypectomy and CT scan of the abdomen on April 16, 1997 under the care of Dr. Navarro. Claimant's CT scan revealed no evidence for liver metastases, an old healed rib fractures on the left and an elliptical low density lesion in the hilum of the spleen likely representing a resolving subcapsular hematoma from prior trauma; but otherwise, an unremarkable abdomen CT was reported. The results of the CT scan were discussed during the follow-up visit with Dr. Jaramillo on April 22, 1997. Therein, Claimant complained that he's having pain because he was twisting his body over the weekend weed eating. In addition, Mr. McGovern stated that he had a lump in testicles and prolonged urination. Dr. Jaramillo prescribed Demerol and Valium and referred Claimant to Dr. Gastaro Anibarro to follow-up for testicular problems (EX 2).

Claimant next treated with Dr. Jaramillo on May 12, 1997 wherein it was reported that Mr. McGovern broke left upper ribs while water skiing. Claimant complained of acute pain and trouble taking a deep breath. Dr. Jaramillo's impression was that Claimant had a contused rib on the left side. However, Dr. Jaramillo was still concerned of the left-sided pain in the Claimant's abdominal area. Dr. Jaramillo prescribed Valium and Demerol and noted that Claimant's pains were "Grade #10" (EX 2). Ostensibly, the term, "Grade" refers to the extent of pain measured on a scale from one to ten. One would be the least amount of pain and ten would be excruciating pain.

A week later, Claimant presented acute pain on the left side of ribs and left side of trunk – same pain incurred after water skiing accident. It was noted that Mr. McGovern had been getting more Demerol, averaging up to two (2) times a day and Valium two (2) times a day. Dr. Jaramillo graded Claimant's pain as "#10" and diagnosed Claimant as having a contusion of the left ribs and muscle spasms in the left side abdominal area. For this, Demerol, Valium and an x-ray of the left rib were all prescribed (EX 2).

Dr. Jaramillo next treated Claimant in June of 1997 wherein Claimant complained of left-sided abdominal pain. Dr. Jaramillo noted that the left pain was getting better – Grade of pain is "#8" – but was a continuous pain, especially at night, and was aggravated by activities, as well as yawning and deep breaths. Additionally, it was reported that Claimant was not working lately. Dr. Jaramillo prescribed Demerol for the pain, Valium and Soma (EX 2).

On July 15, 1997, Claimant presented complaints of low back pain and having to take a lot of aspirin because he's out of medications. Dr. Jaramillo classified Claimant's pain as Grade 8 (on a scale of ten) and noted that the pain was a continuous, dull pain unless there was an abrupt movement. Dr. Jaramillo further reported that Mr. McGovern was very happy working at Disney World. Demerol, Valium and Soma were all prescribed (EX 2).

Claimant next treated with Dr. Jaramillo on August 8, 1997 wherein he complained that he had been hurting his back doing construction work at Universal Studio. Claimant further complained of left-sided pains along the rib cage and reported that he was out of medications. Dr. Jaramillo reported that he'll have to decrease dosage of Demerol because of a liver problem. According to

Dr. Jaramillo's notes, Claimant was unhappy with the decision to decrease the Demerol dosage. Claimant was prescribed Demerol (decreased to 50 mg.), Valium, Soma and Darvacet (EX 2).

During his September 9, 1997 visit with Dr. Jaramillo, Claimant complained of low back pains, stated that the Valium was helping and that an x-ray was not taken. According to Dr. Jaramillo's notes, Claimant described the back pain as off and on piercing pains, sharp pain tingling on right leg. Dr. Jaramillo classified the pain as "Grade #8" and recommended an MRI or an x-ray of the CS spine. Lastly, Dr. Jaramillo prescribed Demerol and Valium. It was noted that the Darvacet did not help (EX 2).

Claimant followed up on October 3, 1997 wherein he complained of being cut on his left forearm by a piece of metal that came flying in the air. Claimant stated that he went to Central Care where he was sutured in vein and skin with seven (7) stitches and wrapped in netting. It was reported that Mr. McGovern claimed to have not been taking the Demerol and Valium. Claimant was again prescribed Valium and Demerol, as well as another prescription drug which is illegible (EX 2).

At his October 29, 1997 appointment, Claimant complained of low back pains, right shoulder numbness and pain behind the shoulder blade. Claimant described the pains as aching in the low back and sharp on right shoulder. In his notes, Dr. Jaramillo reported that a tree landed on Mr. McGovern's shoulder last Saturday. Dr. Jaramillo classified the pain as Grade #9 and described the injury as a marked contusion and purplish in appearance of the right upper arm. Dr. Jaramillo prescribed Zoloft, Darvocet and another illegible prescription medicine (EX 2).

During his December 4, 1997 visit, Claimant complained of back pain, headaches, anxiety, nervousness and stress at work. Claimant further complained that sitting, bending and walking bother him too much and that the Zoloft and Darvicet makes Mr. McGovern sick and can't take it. It was reported that Claimant had been out of medications and had been taking aspirin which had been giving him gastric irritation. Dr. Jaramillo noted that Mr. McGovern described the left lower back pain as sometimes sharp and other times dull, and characterized the pain as stemming from an old injury. According to Dr. Jaramillo's notes, Claimant insisted on taking Demerol, but the prescription could not be refilled. Instead, Valium, Cataplan and Soma were prescribed (EX 2).

Claimant next treated with Dr. Jaramillo on January 5, 1998. Dr. Jaramillo's notes detail Claimant as limping some on his right foot, from an incident when he he jumped from a tree trying to clear some property. It is further noted that Claimant couldn't work well at his carpentry job because of the strained right foot. Dr. Jaramillo noted that there were no signs of dislocation and categorized the pain as "Grade 6-7" (again on a scale of ten). An x-ray of the right foot, Valium and Soma were all prescribed (EX 2).

Claimant did not seek treatment with Dr. Jaramillo again until July 7, 1998. At that time, Claimant presented the following complaints: abdominal pains, both shoulder joints bother him, walking was very painful for him to do, anxiousness and nervousness. The pain was classified as "Grade #8" and Claimant described the pain as continuous and sharp on relief. Dr. Jaramillo prescribed Valium, Soma and Calaflam (EX 2). In his deposition, Dr. Jaramillo testified that he diagnosed Claimant as having muscle spasms, abdominal pains and nervousness (EX 20).

Claimant next treated with Dr. Jaramillo on September 15, 1998 where he complained of low back pain and pain in both shoulder joints, with the Grade of pain being ”#6" constantly and sometimes ”#8-9". Claimant further complained of waking up at night because of joint pains. Dr. Jaramillo prescribed Valium and Soma (EX 2).

Claimant’s next visit with Dr. Jaramillo took place on October 16, 1998. During the visit, Claimant expressed that both shoulders were hurting to the point where he couldn’t lift his hammer. Dr. Jaramillo prescribed Soma, Valium and Prilosec (EX 2).

Claimant, when he met with Dr. Jaramillo on November 16, 1998, complained of bilateral shoulder pain and low back pain – Grade #9. Claimant described the pain as continuous and sharp, relieved by medications. According to the Claimant, the Prilosec is helping, no more indigestion. Claimant was given prescriptions for Prilosec, Valium and Soma (EX 2).

Dr. Jaramillo treated the Claimant on December 18, 1998. Therein, Claimant presented complaints of headaches, low back pain on both sides and pain in the right side of his neck and right shoulder. Claimant described the pain as continuous, off and on severity, Grade #8. Claimant also stated that he was very sore, took the weekend off. Claimant was given prescriptions for Prilosec for his indigestion, Valium, Soma, Lortab and Varotic (EX 2).

Claimant next treated with Dr. Jaramillo on January 21, 1999 wherein he complained of shoulder, neck and low back pain. Claimant again described the pain as continuous and sharp, with a Grade #8. Dr. Jaramillo prescribed the Claimant with the same five (5) medications (EX 2).

On his March 4, 1999 visit, Claimant stated that he mixed up on appointments and didn’t have any more medications. Since he was out of medications, Mr. McGovern took Ibuprofen which Dr. Jaramillo subsequently advised him to not take. Claimant complained of indigestion, headaches, abdominal pains and pain in the shoulder, neck and back. Pains were again described as continuous and were classified as Grade #10. Dr. Jaramillo prescribed the Claimant with the same five (5) medications (EX 2).

During his April 5, 1999 appointment, Claimant complained that the right shoulder pain and back pain were worse – #8 pain Grade. It was reported that Claimant was having difficulty moving and working in different area at work. Claimant was given prescriptions for Valium, Prilosec, Soma and Lortab (EX 2).

May 7, 1999 was the Claimant’s next visit with Dr. Jaramillo. Therein, Claimant had complaints of pain in the right neck, right and left shoulder and since he has been hammering so much, his back has been hurting again. Claimant described the pain (Grade #8) as constant dull to sharp provoked by headaches and stated that he gets relief from Soma and Valium. Dr. Jaramillo prescribed the Claimant with the same four (4) medications (EX 2).

At his June 9, 1999 visit, Claimant complained of pain in both shoulders and low back. The pain (Grade #8) was described as continuous and generally dull until he makes wrong move. Claimant further complained that he can’t sleep because of pains, but he did note that he is eating well and has no more indigestion. Dr. Jaramillo’s notes report that Claimant stated he can’t lift anymore, wanted to be laid off work. It was further reported that Claimant was planning to have bilateral

hernia surgery by Dr. Bronstein. The same four medications were prescribed by Dr. Jaramillo (EX 2).

Claimant next treated with Dr. Jaramillo on July 28, 1999. Claimant reported to have had bilateral hernia repair by Dr. Bronstein and had just returned to work the past week. Claimant presented complaints of bilateral shoulder and low back pains, indigestion and is not sleeping. The pain ("Grade #8") was described as continuous in the shoulders and low back. The same four medications were prescribed by Dr. Jaramillo (EX 2).

Dr. Jaramillo again treated Claimant on September 3, 1999. Therein, Claimant's chief complaints were shoulder bursitis, low back pain, indigestion and is not eating well. The pain (Grade #8) was described as continuous and gets worse, off and on. Dr. Jaramillo prescribed Prilosec, Soma, Lortab and Valium (EX 2).

Claimant next treated with Dr. Jaramillo on October 7, 1999 to which Claimant complained of pains in both shoulders, with the left being worse, low back pain. Claimant further complained that all of his joints ached, except in his knees and ankles. Claimant described pains (Grade #7) as continuous and worse; however, he doesn't notice his pains when he's busy at work. It was noted that the medications – Lortab, Soma and Prilosec – were all working good. Dr. Jaramillo gave the Claimant prescriptions for Soma, Prilosec, Valium and Lortab (EX 2).

November 11, 1999 was Claimant's next appointment with Dr. Jaramillo. At the visit, Claimant complained of left and right shoulder pain and neck pain. Claimant described the pains (Grade #10) as continuous piercing pains, knife-like in the shoulder blades radiating down into fingertips. Dr. Jaramillo gave the Claimant prescriptions for Soma, Prilosec, Valium and Lortab (EX 2).

Claimant next treated with Dr. Jaramillo on December 17, 1999. Therein, Claimant's chief complaints included: left and right shoulder pain, low back pain, neck pains, headaches and trouble sleeping. Claimant stated the pain was improving (Grade #8), and described it as continuously dull all the time and sharp in the left shoulder, left neck and neck upper shoulder. During his deposition, Dr. Jaramillo testified that he diagnosed Claimant as having right and left shoulder spasms and stomach problems on such date. Dr. Jaramillo gave the Claimant prescriptions for Soma, Prilosec, Valium, Lortab and Vasotic (EX 2).

Claimant next sought treatment with Dr. Jaramillo on January 18, 2000. Claimant reported that he went to the emergency room for a slip and fall accident. In addition, Claimant complained on left shoulder pain, neck pain and rib cage pains. Dr. Jaramillo noted that an MRI showed that Mr. McGovern suffered a cracked right rib for which he was given Lortab and Naprosyn, which he didn't take because it bothers his stomach. Claimant further reported that his shoulder and neck condition has gotten worse. Claimant described the pain (Grade #9) as continuous and sharp in the neck and shoulder. It was noted that Claimant suffered tendon damage in his left neck and left shoulder as a result of the fall in his own tub (EX 2). Dr. Jaramillo diagnosed Claimant as having gastritis, muscle aches, neck pain, shoulder pains and a cracked rib (EX 20). For treatment, Dr. Jaramillo prescribed Soma, Valium, Lortab and Cipro (EX 2).

Claimant's next appointment with Dr. Jaramillo took place on February 17, 2000. Claimant's chief complaints were that had he had two (2) cracked ribs on the right side – floating ribs, pain

on the left side of neck and left shoulder pain. Claimant stated that he hasn't gone to work for five (5) weeks now and that he was using a neck brace and left arm brace. Claimant described the pain (Grade #10) as constant dull and sharp pains, depending on moving and activities. Additionally, Claimant was referred to an orthopedics specialist for his shoulder, but didn't go. For treatment, Dr. Jaramillo prescribed Soma, Valium, Prilosec and Lortab (EX 2).

March 6, 2000 was Claimant's next appointment with Dr. Jaramillo. The Claimant reported that he was mugged at Auto Nation by two (2) women who kicked him, stepped on him, hit him with a baseball bat and lung wrench then robbed him of his wallet, money, keys, but not his car. As a result, Claimant sustained a black left eye, severe contusions, abrasions, bruises and a slight clotted blood on the head. Claimant described the pain (Grade #10) as generalized and noted that his joints ached. Dr. Jaramillo reported that Claimant was drunk at the time of the appointment (EX 2). Claimant was diagnosed as having multiple contusions, hematoma on left eye, both elbows and severe contusions of both elbows. Claimant followed-up the following day when he was not drunk. Claimant still described the pain ("Grade #10") as continuous in the back, elbow and shoulder. Claimant complained of headaches, was very depressed about losing $3,000.00 (robbery) and stated that he won't touch alcohol anymore. Dr. Jaramillo diagnosed Claimant as having multiple contusions, generalized body aches and headaches. For treatment, Dr. Jaramillo prescribed Soma, Oxycontin and Valium (EX 2).

Claimant next treated with Dr. Jaramillo on April 7, 2000. Claimant's chief complaint surrounded injuries he sustained in a work accident when a steel object fell on him, causing him to hit the rocks. As a result, the Claimant suffered bruises on his left elbow and the right side of his right leg and severe contusions. Claimant further complained of bilateral shoulder pain and pain in the upper back and left elbow. Mr. McGovern described the pain as "Grade #9" and stated that he was unable to sleep because of the pain and even gets up early because of it. For treatment, Dr. Jaramillo prescribed Prilosec, Soma, Oxycontin and Valium (EX 2).

At his May 10, 2000 appointment, Claimant complained of not being able to sleep well, doesn't have a good appetite, left shoulder strains, sharp pains, headaches, neck pains and cramps in his legs. Claimant described the pain as "Grade #9-10" when sharp and "Grade #6-7" when continuous. Dr. Jaramillo's diagnosis included: abdominal pain, a contusion of the left arm, spasm of the left shoulder, a left shoulder bruise and possibly bursitis. For treatment, Dr. Jaramillo prescribed Soma, Oxycontin and Valium (EX 2).

Claimant's June 12, 2000 appointment was his first appointment with Dr. Jaramillo following the subject work accident. Speaking to the incident, Dr. Jaramillo reported that Mr. McGovern had an accident resulting in an amputation of his right thumb which was performed by Dr. William Myers. Dr. Jaramillo further noted that Claimant's thumb was wrapped in a splint. In addition to the pain in his right thumb, Claimant's chief complaints included bilateral shoulder pain, left neck stiffness, low back pains, headaches. Claimant described the pain ("Grade #9-10") as constant and sharp in the shoulder and left neck. Dr. Jaramillo's diagnosis was the following: headaches; reflux esophagitis; shoulder bursitis; left neck stiffness; and low back pain. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Valium and Soma for the spasms (EX 2).

Claimant next treated with Dr. Jaramillo on July 31, 2000 to which he presented complaints of pain in his joints, neck and low back, as well as headaches. Claimant further complained of feeling sore and not sleeping well. Claimant described the pain (Grade #8) as sharp sometimes and dull at times. Dr. Jaramillo's diagnosis was the following: joints pains, full body aches, muscle spasms and headaches. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Valium, Vasotic and Soma for the spasms (EX 2).

September 21, 2000 was Claimant's next appointment with Dr. Jaramillo. Therein, Mr. McGovern complained that his right shoulder hurt just as bad as his left shoulder pain. Claimant further complained of pain in his back – low, mid and upper portions – as well as headaches and an upset stomach. Claimant characterized the pain as Grade #8. Claimant complaints also included: general body aches, feeling of weakness and no appetite to eat. Upon physical examination, Dr. Jaramillo noted tenderness in the liver area. Dr. Jaramillo reported that the Claimant had been out of medications for the past month because he was out of the state. It was further reported that the Claimant likes the Oxycontin now because he it's helping his pains and that he was begging for Valium for his stress and sleep. According to the report, Claimant denied drug addiction. Dr. Jaramillo's diagnosis was as follows: Hepatitis B or C; Cirrhosis of the liver; hypertension; and other ailments illegible in the medical report. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Valium, Vasotic, Soma for the spasms and Amoxicillin (EX 2).

Claimant treated with Dr. Jaramillo a month later on October 23, 2000. Therein, Claimant presented complaints of left and right shoulder pain, neck pain and low back pain. Claimant described the pain ("Grade #8") as continuous and piercing, but sharp as a result of abrupt movements. Dr. Jaramillo's diagnosis was the following: shoulder bursitis; low back pain; and hypertension. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Valium for anxiety, Vasotic and Soma (EX 2).

Claimant next treated with Dr. Jaramillo on November 8, 2000. Dr. Jaramillo reported that Claimant's recent supply of medications was filled, but lost, so he was without them since October 23, 2000. Specifically, Mr. McGovern advised that he had his bag of prescription medicines taken from his car on October 23, 2000 – Claimant didn't know if he lost the medicine or whether it was stolen by his passenger or the men in the car wash. Dr. Jaramillo further reported that Mr. McGovern wanted to get his Oxycontin prescription, to which he was told that it would have to be dated a month from his last visit (or November 23, 2000). When questioned, Claimant denied drug addiction. Additionally, Claimant presented complaints of shoulder, neck, back and right wrist pain. Claimant stated that he twisted his right wrist while pulling a rope at work; the sudden jarring movement of the wrist provoked severe pains and spasms. Claimant described his pains ("Grade #9") as constant and dull ache ("#7") mostly, but has stabbing pains which catches his attention and makes him stop what he's doing. Dr. Jaramillo's diagnosis was the following: cervical and shoulder pain; acute low back pain; possible Hepatitis C; muscle spasms; and abdominal pain. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pains, Prilosec, Valium for the anxiety and Soma for the spasms. Dr. Jaramillo further instructed Claimant to have his blood works and a CT scan of the abdomen to check for liver pathology (EX 2).

Claimant again treated with Dr. Jaramillo on December 1, 2000. Dr. Jaramillo reported that Mr. McGovern came in late in the day, after postponing his appointments, looking badly shaken, with clothes rumpled and dirty. Dr. Jaramillo further reported that Claimant smelled of alcohol; and when asked if he drank alcohol, he said no, it was O'Doule's non-alcoholic and that he hasn't drank alcohol for years. Claimant's chief complaints were that of headaches, neck pains, stomach aches, indigestion, a poor appetite, continuous neck, shoulder and back pains ("Grade #9"). Dr. Jaramillo's diagnosis was the following: headaches; low back pain; possible Hepatitis C; and muscle spasms. For treatment, Dr. Jaramillo prescribed Oxycontin, Prilosec, Valium for sleep and anxiety, Soma for the muscle spasms and Diovan. Dr. Jaramillo again instructed Claimant to have a CT scan of the abdomen to check for liver pathology (EX 2).

Claimant next treated with Dr. Jaramillo on January 4, 2001 wherein he complained of right and left shoulder pains, left low back pains and indigestion. Claimant described the pain ("Grade #9") as continuous and if wrong movements, it feels like an ice pick puncturing pains. Dr. Jaramillo reported that the Claimant had been out of medications for one (1) week. When questioned, Mr. McGovern denied drug addiction. Lastly, Claimant requested a prescription for Viagra because he wanted to be close to his girlfriend. Dr. Jaramillo's diagnosis was the following: GERD; controlled hypertension; muscle spasms; and acute low back pain. For treatment, Dr. Jaramillo prescribed Oxycontin, Prilosec, Valium for sleep and anxiety, Soma for the muscle spasms and Viagra (EX 2).

Claimant again treated with Dr. Jaramillo on February 8, 2001. Therein, he complained of neck pain, shoulder pains (Grade #8) which are sharp often, but always dull and very painful on past movements. Claimant denies drug addiction, but stated that Oxycontin is what really works. Dr. Jaramillo's diagnosis was the following: gastroesophogeal reflux disease; controlled hypertension; insomnia; neck spasm; and shoulder strain. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Vasotic, Valium for sleep, Soma for the muscle spasms and Viagra (EX 2).

Dr. Jaramillo next saw Claimant on March 20, 2001. Claimant presented complaints of neck pain, right and left shoulder pain, low back pain, as well as right thumb pain. Dr. Jaramillo's notes provide that he was told that Claimant's right shoulder pain was being caused by the stiffness in his right thumb. Claimant characterized the pain as Grade #9 and described it as continuously sharp, with more stinging. Dr. Jaramillo's notes indicate that the Oxycontin was helping, but Claimant advised that he ran out of medications, causing him to take aspirin and coffee. When asked, Claimant denied drug addiction. Dr. Jaramillo's diagnosis was the following: gastroesophogeal reflux disease; gastritis; hypertension; and muscle spasms. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Vasotic, Valium for sleep and Soma for the muscle spasms (EX 2).

Claimant next treated with Dr. Jaramillo on April 19, 2001 wherein he complained of right shoulder pain, pain in the right upper side of the upper and lower back and left upper back pain. Claimant stated that he bruised his left low back and left shoulder, but doesn't remember how it happened. Claimant characterized the pain as Grade #8-9, mostly #9 and described it as a continuous sharp piercing, knife-like pain that shoots down to the low back and right thigh. Claimant denied drug addiction, but stated that the Oxycontin was helping the pain. Dr. Jaramillo's diagnosis was the following: reflux esophogitis; hypertension; contusion of the left

back and left shoulder; and muscle spasms. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Valium for sleep; Soma for the muscle spasms and Zantac (EX 2).

Claimant again treated with Dr. Jaramillo on May 21, 2001. Claimant complained of pain in his neck, shoulders and low back. He characterized the pain as "Grade #8-10" and noted that when he twists his shoulder, the pain worsens. Claimant further complained that going up and down forty (40) stories at work caused radiating to both, shooting pain on legs. Claimant again denied drug addiction, but did state that the Oxycontin was holding his pains, otherwise he can't make it at work. Claimant noted that he eats bananas for leg cramps. Dr. Jaramillo's diagnosis was the following: cervical strain; right shoulder strain; low back pain; GI irritation; and muscle spasms. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Valium for sleep, Soma for the muscle spasms and instructed to continue on the Zantac (EX 2).

June 22, 2001 was Claimant's next appointment with Dr. Jaramillo. Dr. Jaramillo's notes report that Claimant had a car accident when he rolled to the water, but was able to get off from his car. Dr. Jaramillo's further cite that Claimant suffered two (2) broken ribs and a ruptured spleen from the car accident. Claimant's complaints included neck and shoulder pain, shooting low back pain radiating to both legs and soreness over the past two (2) weeks which he hasn't been working. Claimant characterized the pain as Grade #10, with shooting pains in the right leg and thigh. Claimant again denied drug addiction, but added that the Oxycontin was helping. Dr. Jaramillo's diagnosis was the following: gastroesophogeal reflux disease; stress; and muscles spasms. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Valium for sleep and anxiety and Soma for the muscle spasms (EX 2).

Claimant next treated with Dr. Jaramillo on July 20, 2001 wherein he complained of shooting pain down his right leg, low back pain and neck and shoulder pain. Dr. Jaramillo reported that Claimant was badly injured when he fell in the water on the way back to work and hasn't been working lately. Claimant characterized the pain as Grade #10 and described it as continuous and sharp. Claimant denied drug addiction, but stated that he had been taking more than two (2) a day and cutting medications (Oxycontin). Dr. Jaramillo strongly advised Mr. McGovern against this. Dr. Jaramillo's diagnosis was the following: cervical strain; muscle spasm sprain; and low back pain radiating down right leg. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Prilosec, Valium for sleep and anxiety and Soma for the muscle spasms (EX 2).

Claimant again treated with Dr. Jaramillo on September 5, 2001 where he complained of low back pain, bilateral shoulder pain and mid back pains. Claimant characterized the pain as "Grade #10" and described it as continuous and sharp with aches radiating from hips to right thigh and stops in the back of the right knee. Claimant also stated that he can't sit long, denied drug addiction, but the Oxycontin was helping making him able to function at work and tolerate the pain. Dr. Jaramillo's diagnosed Claimant as having depression, anxiety, low back pain and bilateral shoulder pain. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Valium for stress and anxiety, Soma for the muscle spasms and Zantac (EX 2).

Claimant next treated with Dr. Jaramillo on October 5, 2001. His chief complaints included neck, shoulder and back pains, headaches and right leg cramps. Mr. McGovern characterized the pain as Grade #9 and described it as continuous, but did state that the medications are helping him. Dr. Jaramillo's diagnosis was the following: cervical strain; headaches; bilateral shoulder strain;

reflux esophogitis; and stress. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Valium for stress and anxiety, Soma and Nexium (EX 2).

Claimant treated with Dr. Jaramillo a month later on November 5, 2001. At that time, he complained of shoulder bursitis, right neck pain and low back pain. Claimant characterized the pain as "Grade #10", on a scale of 10, and described it as continuous and dull short pains; however, movement aggravates the pain, while continuous sitting aggravates low back pain. Claimant again denied drug addiction. Dr. Jaramillo's diagnosis was the following: degenerative arthritis; depression; insomnia; cervical strain; low back strain; and reflux esophogitis. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Valium for stress and anxiety, Soma for the muscle spasms and Nexium (EX 2).

Claimant again met with Dr. Jaramillo on December 4, 2001 where he complained of right shoulder bursitis, neck and low back pain and right shoulder blade pain. Claimant further complained that the right thumb was getting worse. Mr. McGovern characterized the pain as "Grade #10" without medications, but Grade #7-8 with medications which allow him to move around on abrupt movement. Claimant further described the pain as always being there, either aching, throbbing, shooting or sharp and penetrating. Claimant denied drug addiction, but noted that the Oxycontin is helping. Dr. Jaramillo advised Mr. McGovern to cooperate in tapering off Oxycontin if pain has been persisting. While Claimant did agree to this, he begged to hold off until next month. Dr. Jaramillo's diagnosis was the following: degenerative arthritis; muscle spasms; right shoulder bursitis/strain; cervical strain; low back pain; and stress and anxiety. For treatment, Dr. Jaramillo prescribed Oxycontin for severe pain, Valium for stress and anxiety, Soma for the muscle spasms and Nexium (EX 2).

In addition to his medical records, Dr. Jaramillo offered deposition testimony on March 26, 2002. Dr. Jaramillo testified that he is an internal medicine physician. However, he is not board certified, only board eligible. Dr. Jaramillo stated that he's been treated Mr. McGovern since 1994 when he first came to his office complaining of muscle aches, bone pains, back pains and shoulder and arm pains. On cross-examination, Dr. Jaramillo added that he treated Claimant for low back pain, ulcers, a possible hernia, headaches and shoulder pain (EX 20).

When asked if it was fair to say that, from October 15, 1998 through May 10, 2000, whether the Claimant was treated for back and shoulder pain, Dr. Jaramillo responded in the affirmative. In describing Claimant's shoulder pain, Dr. Jaramillo stated "it is not continuous, the shoulder pain comes and goes – only continuous on July 28, 1999."

When questioned about the effects of Claimant's right thumb injury, Dr. Jaramillo testified that "Claimant did not tell him that the pile driver or in this accident that he had hurt his shoulder or his back." And while Dr. Jaramillo offered that he would defer to Dr. Myers for the care and treatment of the thumb injury and permanent impairment rating, he testified that it was his belief "that Claimant can still work with the left finger, right finger; he can move and he can work." Lastly, Dr. Jaramillo concluded that the "Claimant is not permanently and totally disabled as a result of the right thumb injury and can work" (EX 20).

Discussion

Average Weekly Wage and Compensation Rate

Under the Longshore and Harbor Workers' Compensation Act, disability compensation is based on the injured worker's average weekly wage. 33 U.S.C. § 910. Section 910 of the Act sets forth three (3) alternative methods – Sections 910(a), (b), and (c)[5] – for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 910(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. ***Johnson v. Newport News Shipbuilding & Dry Dock Co.,*** 25 BRBS 340 (1992); ***Lobus v. I.T.O. Corp. of Baltimore,*** 24 BRBS 137 (1990); ***Orkney v. General Dynamics Corp.,*** 8 BRBS 543 (1978); ***Barber v. Tri-State Terminals,*** 3 BRBS 244 (1976), *aff'd sub nom.* ***Tri-State Terminals v. Jesse,*** 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

It must be noted that the Claimant's average weekly wage of $345.64, according to the Adjuster, was arrived at by dividing the total earnings of the Claimant for the preceding year ($17,973.28) by fifty two (52) (CX 10, EX 18). The Act does not establish this method to compute the average weekly wage. Instead, the Act requires one to first determine the Claimant's average annual wage, which is then divided by fifty two (52) as mandated by Section 910(d)(1). Under the Employer/Carrier's method, the resulting average weekly wage is inaccurate, is based on only part of the record wages, and constitutes an unfair and unreasonable approximation of the Claimant's annual wage-earning capacity at the time of this injury.

Section 910(a) applies in cases where the injured claimant "worked in the employment in which he was working at the time of the injury ... during substantially the whole of the year immediately

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[5] Section 910 provides in pertinent part: Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, the two-hundred and sixty times the average daily wage or salary, which an employee of the same class working in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee can not reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.
33 U.S.C. § 910(a)-(c).

preceding his injury." 33 U.S.C. § 910(a); ***Hall v. Consolidated Employment Systems, Inc.,*** 139 F.3d at 1030. "Substantially the whole year" refers to the nature of Claimant's employment, i.e., whether intermittent or permanent, ***Eleazar v. General Dynamics Corporation,*** 7 BRBS 75 (1977), and that he could have actually earned wages during all 260 days of that year, ***O'Connor v. Jeffboat, Inc.,*** 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or employer's varying daily needs. ***Lozupone v. Stephano Lozupone and Sons,*** 12 BRBS 148, 156-57 (1979). A substantial part of the year may be composed of work for two (2) different employers where the skills used in the two (2) jobs are highly comparable. ***Hole v. Miami Shipyards,*** 12 BRBS 38 (1980). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," ***Duncan v. Washington Metropolitan Area Transit Authority,*** 24 BRBS 133, 136 (1990), but 33 weeks is not a substantial part of the previous year. ***Lozupone,*** *supra.*

The Claimant contends that Section 910(a) is not applicable because Mr. McGovern does not have thirty four (34) weeks of earnings during the fifty two (52) weeks prior to the subject accident. Additionally, the Claimant argues that the Claimant's employment with Baker Concrete Construction Co. should not count in the calculation since it was not similar employment[6], as mandated by the law. The Employer, on the other hand, argues that the evidence demonstrates that the Claimant worked at least 27.2 weeks during the year prior to his accident, and more likely that he worked thirty two (32) or thirty three (33) weeks for both W.F. Magann and Baker Concrete during the fifty two (52) week period pre-injury. And as a result, the Employer contends that Mr. McGovern's average weekly wage of $345.64 was correctly calculated under §10(a) of the Act.

Based on the evidence on record, the Claimant worked a total of twenty-eight (28) weeks – twenty one (21) weeks with Baker Concrete Construction Co. (CX 8, EX 8) and six (6) weeks with W.F. Magann (CX 9, EX 9, EX 10). There is no direct evidence to substantiate the Employer's assertion that the Claimant worked for 32 – 33 weeks during the 52-week period which preceded his work accident. As a result, I find that the Claimant did not work "substantially the whole of the year" in relation to the 52-week period preceding the subject accident. *See* ***Duncan v. Washington Metropolitan Area Transit Authority,*** 24 BRBS at 136. Therefore, Section 10(a) is inapplicable.
Section 910(b) provides that if the employee has not worked substantially all of the preceding year in the employment in which he was working at the time of the injury, his average weekly wage is based on the employment history of a typical worker in the similar employment and in the same locality. 33 U.S.C. § 910(b); ***Hall,*** at 1030. Section 910(b) is generally used when the injured worker has had too little time on the job to allow an accurate determination of his wages. ***Hall,*** at 1030. Section 910(b) cannot be applied due to the lack of evidence as to the wages earned by a comparable employee. ***Newpark Shipbuilding & Repair, Inc. v. Roundtree,*** 698 F.2d 743 (5th Cir. 1983), *rev'd on other grounds,* 13 BRBS 862 (1981), *rehearing granted en banc,* 706 F.2d 502 (5th Cir. 1983), *petition for review dismissed,* 723 F.2d 399 (5th Cir. 1984), *cert. denied,* 469 U.S. 818, 105 S.Ct. 88 (1984).

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[6] In his post-hearing brief, the Claimant asserts that the work for the Employer, W.F. Magann, was clearly different than the work done for Baker, where the Claimant was working for the space program as opposed to the maritime work for Magann.

Section 910(c) governs when the first two (2) methods cannot "reasonably and fairly be applied." 33 U.S.C. § 910(c); ***Hall,*** at 1030 (citing ***Empire United Stevedores v. Gatlin,*** 936 F.2d 819, 822 (5th Cir. 1991)). Theoretically, Section 910(c) should be used in cases when actual earnings during the year preceding the injury do not reasonably and fairly represent the pre-injury wage-earning capacity of the claimant. ***Gilliam v. Addison Crane Co.,*** 21 BRBS 91, 92-93 (1987). Situations where Section 10(c) is used include following:

(1) Where the claimant's employment is seasonal, part-time, intermittent, or discontinuous. ***Empire United Stevedores v. Gatlin,*** 936 F.2d 819 (5th Cir. 1991)(claimant's earnings from a prior year where he worked as a salesman/manager more accurately reflected his actual earning capacity than his sporadic employment from the year prior to the injury); ***Palacios v. Campbell Indus.,*** 633 F.2d 840, 841-42 (9th Cir. 1980); ***Guthrie v. Holmes & Narver, Inc.,*** 30 BRBS 48 (1996); ***Lobus v. I.T.O. Corp. of Baltimore,*** 24 BRBS 137 (1990); ***Gilliam v. Addison Crane Co.,*** 21 BRBS 91, 93 (1987)(claimant worked "substantially the whole of the year," yet 10(a) did not apply as claimant was laid off twice in the year preceding the injury due to weather-induced unavailability of work); ***Mattera v. M/V Mary Antoinette Pac. King, Inc.,*** 20 BRBS 43, 45 (1987)(claimant only worked when fishing boats were in the harbor).

(2) Where there is insufficient evidence in the record to make a determination of average daily wage under either subsections (a) or (b). ***Todd Shipyards Corp. v. Director,*** OWCP, 545 F.2d 1176, 5 BRBS 23, 25 (9th Cir. 1976), *aff'd and remanded in part* 1 BRBS 159 (1974); ***Sproull v. Stevedoring Servs. of America,*** 25 BRBS 100, 104 (1991); Lobus, 24 BRBS at 140; ***Taylor v. Smith & Kelly Co.,*** 14 BRBS 489 (1981).

(3) Whenever Sections 10(a) or 10(b) cannot reasonably and fairly be applied and therefore do not yield an average daily weekly wage that reflects the claimant's earning capacity at the time of the injury, ***Empire United Stevedores v. Gatlin,*** 936 F.2d 819 (5th Cir. 1991); ***Walker v. Washington Metro. Area Transit Auth.,*** 793 F.2d 319 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); ***Browder v. Dillingham Ship Repair,*** 24 BRBS 216, 218 (1991), or use of Section 10(a) or (b) would result in overcompensation to the claimant. ***Duncanson-Harrelson Co. v. Director,*** OWCP, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983); ***Gilliam,*** 21 BRBS at 93.

(4) Where the claimant had various employments in the years prior to injury, including non-longshoring activities and self-employment. 33 U.S.C. § 910(c); ***Hayes v. P & M Crane Co.,*** 23 BRBS 389, 393 (1990)(focus on short-term recent earnings rather than earlier self-employment earnings is proper); ***Harrison v. Todd Pac. Shipyards Corp.,*** 21 BRBS 339, 344-45 (1988)(frequent job changes, tendency to get fired, previous convictions, plus good fortune in being hired by employer two months before injury are all appropriate considerations only under § 10(c)).

(5) Where the claimant's wages or hours worked increased shortly before his injury. ***Hastings v. Earth Satellite Corp.,*** 628 F.2d 85, 94-96 (D.C. Cir.), cert. denied, 449 U.S. 905 (1980); ***Le v. Sioux City and New Orleans Terminal Corp.,*** 18 BRBS 175, 177 (1986), *but see dissenting opinion in* ***Roundtree,*** 13 BRBS at 871-72.

The Claimant argues that his average weekly wage should be calculated under Section 910(c) since Sections 910(a) and (b) are not applicable. In doing so, Claimant asserts that he should be getting $770.00 per week as his average weekly wage or an amount of $990.68 when using his employment with Magann, or an of $959.00 if the amounts earned with Baker Concrete and W.F. Magann are combined. While it is the Employer's belief that Claimant's average weekly wage was correctly calculated under §910(a), W.F. Magann alternatively offers that Claimant's average weekly wage was correctly calculated at the same rate pursuant to §910(c) of the Act, since a review of Mr. McGovern's earnings during the 52-week time period prior to his accident demonstrates that the average weekly wage rate which he was paid accurately reflected his prior wage-earning capacity.

Herein, Section 910(c) is the applicable method to determine the Claimant's average annual earnings. First, Sections 10(a) and (b) are not applicable based on the aforementioned reasons. Secondly, calculating Claimant's average weekly wage pursuant to § 910(a) would not accurately and fairly reflect his earning capacity at the time of his injury due to the fact that Mr. McGovern did not work a substantial portion of the year preceding his injury.

I have broad discretion in determining annual earning capacity under Section 910(c). ***Sproull v. Stevedoring Servs. of America,*** 25 BRBS 100, 105 (1991); ***Wayland v. Moore Dry Dock,*** 25 BRBS 53, 59 (1991); ***Lobus v. I.T.O. Corp. of Baltimore,*** 24 BRBS 137, 139 (1990); ***Bonner v. National Steel & Shipbuilding Co.,*** 5 BRBS 290, 293 (1977), *aff'd in pertinent part*, 600 F.2d 1288 (9th Cir. 1979). A definition of 'earning capacity' for purposes of this section is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." ***Jackson v. Potomac Temporaries, Inc.,*** 12 BRBS 410, 413 (1980). *See* ***Walker v. Washington Metro Area Transit Auth.,*** 793 F.2d 319 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); ***Tri-State Terminals v. Jesse,*** 596 F.2d 752, 757 (7th Cir. 1979); ***Marshall v. Andrew F. Mahoney Co.,*** 56 F.2d 74, 78 (9th Cir. 1932); ***Mijangos v. Avondale Shipyards,*** 19 BRBS 15, 20 (1986).

In calculating annual earning capacity under Section 10(c), I may consider: the actual earnings of the claimant at the time of injury[7]; the average annual earnings of others[8]; the earning pattern of the claimant over a period of years prior to the injury[9]; the claimant's typical wage rate multiplied

[7] ***Hayes v. P & M Crane Co.,*** 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (5th Cir. 1991); ***Harrison v. Todd Pac. Shipyards Corp.,*** 21 BRBS 339, 344-45 (1988). *See also* ***Dangerfield v. Todd Pac. Shipyards Corp.,*** 22 BRBS 104 (1989).

[8] ***Palacios v. Campbell Indus.,*** 633 F.2d 840, 842-43 (9th Cir. 1980); ***Hayes,*** 23 BRBS at 393; ***Harrison v. Todd Pac. Shipyards Corp.,*** 21 BRBS 339 (1988); 33 U.S.C. 910(c).

[9] ***Konda v. Bethlehem Steel Corp.,*** 5 BRBS 58 (1976); ***Empire United Stevedores v. Gatlin,*** 936 F.2d 819 (5th Cir. 1991); ***Anderson v. Todd Shipyards,*** 13 BRBS 593 (1981).

by a time variable[10]; all sources of income including earnings from other employment in the year preceding
injury[11], overtime[12], vacation or holiday pay[13], and commissions[14]; the probable future earnings of the
claimant[15]; or any fair and reasonable alternative.

Of the aforementioned considerations, the evidence of record contains only the Claimant's actual earnings at the time of injury (CX 9, EX 9, EX 10). There is no evidence pertaining to the annual earnings of others. A good reason for this is large in part to the fact that the Employer only employed one (1) pile driver – the Claimant – for the project in which Mr. McGovern was employed (Tr. 111-114). Additionally, there is no evidence which would constitute an earning pattern of the Claimant over a period of years prior to the injury.[16] As a result, the Claimant's earning capacity will be determined by his actual earnings at the time of injury. ***Hayes v. P& M Crane Co.,*** 23 BRBS 389, 393 (5th Cir. 1991); ***Harrison v. Todd Pac. Shipyards Corp.,*** 21

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[10] ***Lozupone v. Stephano Lozupone & Sons,*** 14 BRBS 462, 465 (1981)(Board approved the use of the claimant's contract hourly wage); ***Cummins v. Todd Shipyards Corp.,*** 12 BRBS 283, 287 (1980). If this method is used, however, the time variable must be one which reasonably represents the amount of work which normally would have been available to the claimant. ***Matthews v. Mid-States Stevedoring Corp.,*** 11 BRBS 509, 513 (1979).

[11] ***Harper v. Office Movers/E.I. Kane,*** 19 BRBS 128 (1986); ***Wise v. Horace Allen Excavating Co.,*** 7 BRBS 1052 (1978).

[12] ***Bury v. Joseph Smith & Sons,*** 13 BRBS 694, 698 (1981)(In computing average annual earnings under Section 10(c), overtime should be included if it is a regular and normal part of the claimant's employment); ***Ward v. General Dynamics Corp.,*** 9 BRBS 569 (1978); ***Gray v. General Dynamics Corp., Elec. Boat Div.,*** 5 BRBS 279 (1976), *aff'd on other grounds sub nom.* ***General Dynamics Corp., Elec. Boat Div. v. Benefits Review Board,*** 565 F.2d 208, 7 BRBS 831 (2nd Cir. 1977).

[13] ***Sproull v. Stevedoring Servs. of America,*** 25 BRBS 100 (1991)(Vacation and holiday pay, calculated the year it is received rather than the year it is earned, should also be included in a computation of average weekly wage under Section 10(c)). *See also* ***Duncan v. Washington Metro. Area Transit Auth.,*** 24 BRBS 133 (1990).

[14] ***Wayland v. Moore Dry Dock,*** 25 BRBS 53, 59 (1991)(All commissions are also to be included in determining average weekly wage); ***Lobus v. I.T.O. Corp. of Baltimore,*** 24 BRBS 137 (1990)(commissions from real estate employment were calculated into average weekly wage under Section 10(c)).

[15] ***Walker v. Washington Metro. Area Transit Auth.,*** 793 F.2d 319, 321 (D.C. Cir. 1986)(Consideration of the probably future earnings of the claimant is appropriate in extraordinary circumstances where previous earnings do not realistically reflect wage-earning potential), *cert. denied*, 479 U.S. 1094 (1987); ***Palacios v. Campbell Indus.,*** 633 F.2d 840, 842-43, 12 BRBS 806 (9th Cir. 1980); ***Gilliam v. Addison Crane Co.,*** 21 BRBS 91, 93 (1987)

[16] The record only contains Claimant's pay history for the 52 weeks that preceded his work injury (CX 8, CX 9, EX 8, EX 9).

BRBS 339, 344-45 (1988). *See also* ***Dangerfield v. Todd Pac. Shipyards Corp.,*** 22 BRBS 104 (1989).

In calculating the average weekly wage under Section 910(c), I must arrive at a figure which approximates an entire year of work (the average annual earnings). That figure is then divided by 52, as required by Section 910(d), to arrive at the average weekly wage. ***Wayland v. Moore Dry Dock,*** 25 BRBS 53, 59 (1991); ***Brien v. Precision Valve/Bayley Marine,*** 23 BRBS 207, 211 (1990). Claimant worked a total of 241.50 regular hours during the thirty one (31) days in which he worked for the Employer prior to his injury (EX 10). Based on Claimant's hourly rate of $19.25 per hour (CX 1), his earnings for this time period would equal $4,648.88. To calculate Claimant's average annual earnings with the Employer, Claimant's earnings ($4,648.88) must first be divided by the number of days (31) he actually worked prior to his injury. As a result, Claimant's daily wage is $149.96. Because the Claimant was a five (5) day worker for the Employer (EX 10), the average daily wage ($149.96) is multiplied by 260, which computes Claimant's average annual earnings to be $38,989.60. Pursuant to Section 910(d), Claimant's average weekly wage is then determined by dividing his average annual earnings by fifty two (52). Thus, I find Claimant's average weekly wage to be $749.80, which is substantially more than what was determined by the Adjuster (CX 10, EX 18).

First Choice of Physician

Pursuant to Section 7(b) of the Longshore and Harbor Workers' Compensation Act, the employee has the right to choose an attending physician. 33 U.S.C. § 907(b). If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the Employer shall select a physician for him. 33 U.S.C. § 907(b); 20 C.F.R. § 702.45. Once an employee has made his initial, free choice of an attending physician, he may not change physicians unless the employer, carrier, or deputy commissioner has given prior consent for such change. Such consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change. *See* 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406(a).

The Claimant argues that he was never given his first choice of physician and if so, Dr. Myers would not have been his first choice of physician. Despite the fact that he checked the "Yes" box in provision 27 of the LS-203 which affirms that he received medical care of his choice, Claimant contends that he did not understand the meaning of such provision. To support his argument, Claimant cites to Webster's Dictionary which defines 'choice' as "the act of choosing; the voluntary and purposive or deliberate picking, singling out or selecting that which is favored or superior," with a further definition providing "right, privilege, opportunity or faculty of freely choosing, picking or deciding." From this, Claimant deduces that the choosing of the doctor is a deliberative act and not a passive act. Therefore, the Claimant asserts that he was given his first choice of physician since he never made the selection and testified that he wanted an alternative physician and not Dr. Myers.

The Employer/Carrier, on the other hand, argues that the Claimant is not entitled to a change of physician since he has not demonstrated good cause to warrant a change in treating physician.

Immediately after injuring his right thumb, Claimant was sent to Port Orange, then to the emergency room at Halifax Hospital. Claimant testified that Dr. Myers thereafter performed the operation on his thumb (Tr. 30). Claimant further testified that he returned to see Dr. Myers over a period of time, eight (8) to ten (10) visits, for treatment (Tr. 30-31). The record reflects that the Claimant continued to treat with Dr. Myers from May 2000 through October 2000.

Claimant testified that he never chose Dr. Myers (Tr. 34) and in fact claims to have asked Dr. Myers for a change in physicians. He did not present anything in writing in support and Dr. Myers' records do not reflect this request. Moreover, on cross-examination, Claimant testified that he doesn't have a specific date as to when he asked Dr. Myers if he could see a different doctor. Also on cross-examination, Claimant admitted that he has no written proof or independent confirmation to support his claim that he asked Dr. Myers for a change in physicians or for a second opinion at some point between June 25, 2000 when he filled out his Form LS-203 (Claim for Compensation) and September 13, 2000 when he retained Attorney Schwartz. Furthermore, Claimant stated that he had no recollection, independent, of ever asking anyone besides Dr. Myers for a change in treating physicians before September 13, 2000 (Tr. 97, EX 22). Additionally, Dr. Myers testified in his deposition that the Claimant never indicated at any time that Dr. Myers was not his voluntary and free choice physician. Dr. Myers further testified that Claimant never requested to be evaluated by Dr. Joanne Werntz (Tr. 19).

As for his Claim for Compensation which he filed on June 25, 2000, Claimant testified that he really didn't understand section 27 of the LS-203, which asked if he received his first choice of physician (Tr. 34). Alternatively, Claimant, on cross-examination, testified that he read language at the bottom of the LS-203 filled out the form in his own writing and signed it (Tr. 45)

There are two (2) instances where the Employer is required to consent to a change of physicians: (1) if the employee's initial choice was not of a specialist whose services were necessary for proper care and treatment, or (2) if the employee demonstrates good cause for a change of physician. 20 C.F.R. § 702.406(a).

Drs. Myers and Werntz are both orthopedic surgeons, specializing in hand surgery[17] (ALJ 2, EX 19, EX 22). Additionally, Dr. Myers services were necessary at the time of his initial treatment. And lastly, Dr. Myers did not refuse to further treat the Claimant following the initial treatment. For these reasons, Claimant is relegated to demonstrate good cause in order to obtain a proper change of physician. *See* 20 C.F.R. § 702.406(a).

The facts presented here are very similar to those in ***Mull v. Newport News Shipbuilding Co.,*** 29 BRBS 739 (1995). In ***Mull,*** the Court found that there was no good cause sufficient to warrant a change of physician where the claimant had made her choice of initial physician by signing a

[17] According to the American Medical Association, Dr. Joanne Ruth Werntz is board certified in orthopaedic surgery, with a specialty in hand surgery. *See* www.ama-assn.org/iwcf/iwcfmgr206/SESSION_ID=179004/SESSION_AR=490/frm_name=aps_result?action_detail.x=hello&row=0&key=0&amap=N&form_type=r.

designation form without objection, and where the claimant did not seek a change in physician until several months after she began treating with her initial choice physician.

I note that there is no basis to impeach Dr. Myers' credibility on this issue. However, the Claimant's credibility must be discounted. First, he can not adequately explain away that he read, completed and signed his initial LS-203 Claim for Compensation on June 25, 2000. As to whether he failed to understand the question of whether he received treatment by a physician of his choice, even had he been in pain, and even if he had not fully understood the nature of the form and the consequences of signing it, the record does not show that he took subsequent steps to rescind this authorization. In the beginning, if Mr. McGovern truly did not understand the question, he should have consulted with someone before checking "yes" to the question. Later, the Claimant continued to treat with Dr. Myers for the six (6) months that followed his work accident. Throughout the treatment, the Claimant followed Dr. Myers instructions and recommendations. He did not seek treatment from anyone else for the finger, even as he was treated by Dr. Jaramillo for other impairments. Furthermore, there is nothing in the record to substantiate his claim that he requested to have a different physician. To the contrary, the first documentation (Claimant's Second Claim for Compensation) which provides that Claimant was not treated by a first choice physician is dated September 15, 2000, only two (2) days after Claimant retained his attorney (EX 22). I note elsewhere in this decision that the Claimant has other problems with credibility. At a minimum, the Claimant's actions constitute a tacit selection of Dr. Myers as his treating physician. And by continuing to seek treatment from him, Mr. McGovern continually reinforced, reaffirmed, substantiated and ratified the doctor patient relationship with Dr. Myers.

The record reflects that Mr. McGovern selected Dr. William Myers as his physician and there is no indication that the Employer refused to provide treatment. Therefore, I find that the Claimant has not made a showing of good cause for a change of physicians in this case. *See* ***Mull v. Newport News Shipbuilding Co.,*** 29 BRBS 739 (1995); ***Slattery Associates, Inc. v. Lloyd,*** 16 BRBS 44 (CRT) (D.C. Cir. 1984); ***Parklands, Inc. v. Director,*** OWCP, 22 BRBS 57 (CRT) (D.C. Cir. 1989).

Interest

Although not specifically authorized by the Act, it has been an accepted practice that interest, at a rate of six (6) per cent per annum, is assessed on all past due compensation payments. ***Avallone v. Todd Shipyards Corp.,*** 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. ***Watkins v. Newport News Shipbuilding & Dry Dock Co.***, 8 BRBS 556 (1978), **aff'd in pertinent part** and *rev'd on other grounds sub nom. **Newport News v. Director, OWCP***, 594 F.2d 986 (4th Cir. 1979); ***Santos v. General Dynamics Corp.***, 22 BRBS 226 (1989); ***Adams v. Newport News*****Shipbuilding** , 22 BRBS 78 (1989); ***Smith v. Ingalls Shipbuilding***, 22 BRBS 26, 50 (1989); ***Caudill v. Sea Tac Alaska Shipbuilding***, 22 BRBS 10 (1988); ***Perry v. Carolina Shipping***, 20 BRBS 90 (1987); ***Hoey v. General Dynamics Corp.***, 17BRBS 229 (1985).

Claimant contends that he is due interest on back total temporary disability benefits that were paid by the Employer/Carrier. Claimant's Counsel cites the adjuster's testimony, where he stated that he did not pay interest on these particular benefits because he took the position that there was no

obligation to pay such interest, as proof that his client is entitled to interest on the $979.14 that was due to him.

Alternatively, the Employer/Carrier argues that the Claimant is not entitled to interest on back benefits due to the his failure to provide the adjuster with concurrent wage information which was repeatedly requested from Claimant, both verbally and by written correspondence, and then subsequently from his attorney via written correspondence. Furthermore, the Employer/Carrier provides that, once the Claimant's attorney furnished those concurrent earnings, the adjuster Kraig Breaux paid increased back temporary total disability benefits within three (3) days.

Under the Longshore and Harbor Workers' Compensation Act, an employee's compensation becomes due, if not controverted, fourteen (14) days after he files notice, even absent an award. 33 U.S.C. § 914(a), (b); ***Wilkerson v. Ingalls Shipbuilding, Inc.,*** 125 F.3d 904, 907-08 (5th Cir. 1997). In the event that any installment of compensation payable without an award is not paid within fourteen (14) days after it becomes due, the Act provides that there shall be added to such unpaid installment an amount equal to 10 per cent centum thereof, ... unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment. 33 U.S.C. § 914(e).

The purpose of prejudgment interest is the basic principle of compensatory damages: that the injured party should be made whole. In order to compensate an aggrieved party fully, he must be compensated for the loss of use of the money due as damages. ***Wilkerson v. Ingalls Shipbuilding, Inc.,*** 125 F.3d 904, 907 (5th Cir. 1997). With few exceptions, all that is needed to formulate an award is a determination of the disability, knowledge of the wages of the worker and of the maximum compensation amounts, and a calculator. ***Wilkerson,*** 125 F.3d at 907. The Fifth Circuit, however, in ***Reeled Tubing, Inc. v. M/V CHAD "G",*** 794 F.2d 1026, 1028 (5th Cir. 1986), held that interest may be denied where the court finds "peculiar circumstances" that would render an award of interest inequitable. ***In re P & E Boat Rentals, Inc. v. Ennia General Ins. Co., Inc.,*** 872 F.2d 642, 655-56 (*quoting* ***Reeled Tubing,*** 872 F.2d at 1028).

Herein, the evidence on record shows that the adjuster, Kraig Breaux, on numerous occasions attempted to contact the Claimant in order to obtain concurrent wage information documentation from Baker Concrete Construction Co., which would allow him to properly calculate Claimant's temporary total disability benefits. Included as Exhibits "A" and "B" in the Employer/Carrier's post-hearing brief are letters to the Claimant and his attorney, John Schwartz. In each, Mr. Breaux requests documentation from the Claimant for additional earnings he may have had during the period of May 11, 1999 through May 10, 2000. In addition, the Claimant testified at hearing that Mr. Breaux contacted him in order to discuss matters pertaining to his average weekly wage and salary. Further, Claimant stated that Mr. Breaux asked him for such information (Tr. 35) and sent letters to that effect (Tr. 44).

It is fair to say that peculiar circumstances prohibited the Claimant from receiving total temporary disability benefits which reflected his earnings from Baker Concrete. The adjuster made every conceivable attempt to ascertain the necessary information from the Claimant. And within three (3) days of receiving Claimant's documentation of additional earnings from his attorney, the Claimant received additional temporary total disability benefits in the amount of $522.00. By

failing to provide the adjuster with his proper earnings, Claimant's actions (or inactions) resulted in him not being paid the full amount of total temporary disability benefits.

Awarding prejudgment interest under such circumstances would result in a windfall to the Claimant which goes against the very principle behind compensatory damages. It is for the reasons that Claimant request for interest on amounts previously paid is therefore denied.

However, the Claimant is entitled to receive interest on the difference between the amount that it should have paid, given my determination concerning the compensation rate, and the amount it previously paid.

Compensability of Shoulder

The claimant bears the burden to establish the necessity of treatment rendered for his work-related injury, *see generally* ***Schoen v. U.S. Chamber of Commerce,*** 30 BRBS 112 (1996); ***Wheeler v. Interocean Stevedoring, Inc.,*** 21 BRBS 33 (1988); ***Ballesteros v. Williamette Western Corp.,*** 20 BRBS 184 (1988). I am entitled to evaluate the credibility of all witnesses and to draw inferences from the evidence. ***Wendler v. American National Red Cross,*** 23 BRBS 408, 412 (1990). It is also well-established that I am not bound to accept the opinion or theory of any particular medical examiner. ***Hite v. Dresser Guiberson Pumping,*** 22 BRBS 97, 91 (1989).

The Act provides a presumption that a claim comes within its provisions. *See* 33 U.S.C. § 920(a). This presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." ***Swinton v. J. Frank Kelly, Inc.,*** 554 F.2d 1075 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976). The Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. ***Golden v. Eller & Co.,*** 8 BRBS 846 (1978), aff'd 620 F.2d 71 (5th Cir. 1980); ***Hampton v. Bethlehem Steel Corp.,*** 24 BRBS 141 (1990); ***Miranda v. Excavation Construction, Inc.,*** 13 BRBS 882 (1981).

This statutory presumption, however, does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a *prima facie* case. The Supreme Court has held that "[a] *prima facie* 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." ***United States Indus./Fed Sheet Metal, Inc. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor,*** 455 U.S. 608, 615 (1982).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. ***Parsons v. Corp. of California v. Director, OWCP,*** 619 F.2d (9th Cir. 1980); ***Butler v. District Parking Management Co.,*** 363 F.2d 682 (D.C. 1966); ***Ranks v. Bath Iron Works Corp.,*** 22 BRBS 301, 305 (1989). Once the

claimant establishes a physical harm and working conditions, which could have caused or aggravated the harm or pain, the burden shifts to the employer to establish that the claimant's condition was not caused or aggravated by his employment.

The Claimant contends that he developed shoulder problems due to the fact that the jerking motion when his thumb was ripped off caused him to have shoulder problems, and that having his arm in a sling elevated above his heart for a period of time further caused his shoulder to become more symptomatic. Claimant further contends that, despite having severe pre-existing shoulder difficulties, his shoulder has become worse. As a result, Claimant asserts that he has demonstrated a harm and a medical problem pursuant to Section 20(a) of the Act. Therefore, Mr. McGovern believes that, at the very least, he is entitled to have a physician exam his shoulder and rule whether there is in fact a shoulder problem related to his work accident.

Alternatively, the Employer argues that the Claimant's back, neck and/or shoulder injuries are not related to his industrial accident. Rather, the Employer/Carrier asserts that it was not until Claimant retained Counsel that he began claiming back, neck and/or shoulder injuries as related to his accident. The Employer/Carrier also offers that the Claimant, at no time prior to the filing of the LS-203, dated September 15, 2000, advised either his treating physician or the Employer/Carrier or the OWCP that he had a back, neck and/or a right shoulder injury resulting from the industrial accident. In further support, the Employer/Carrier argues that the Claimant had pre-existing shoulder problems at the time of the accident and at no time did he complain of back pain or shoulder to Dr. Myers. Lastly, the Employer/Carrier contends that the Claimant's testimony is unreliable and therefore requests that such testimony be disregarded.

Because the Claimant is invoking the Section 20(a) presumption, I must first determine whether to accept his testimony as credible. The Employer/Carrier first calls Mr. McGovern's credibility into question based on his testimony surrounding his medical history. Specifically, the Employer cites to Claimant's inability to recall complaints of back and shoulder pains, which are noted throughout his medical records, as well as various accidents to which the Claimant was involved. In addition, the Employer/Carrier calls into question some other matters related to the Claimant's social history. Lastly, the Employer/Carrier cites to the Claimant's testimony pertaining to his ability to work as reason to find his testimony unreliable.[18]

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[18] 29 CFR § 18.404 (b) provides in part pertinent:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

At hearing, I permitted admission of a criminal record (EX 23) into evidence, primarily for impeachment purposes (Tr. 54-55). The Claimant failed to object to the proffer at the time it was entered. Later, by argument, he argued that it must be stricken. Given the great length of time that has passed since Claimant's conviction as well as the fact that it did not involve a crime of falsehood, I decline to use Claimant's conviction as reason to find his testimony unreliable. Moreover, I order it stricken from the record.

First of all, the Claimant provides no medical evidence in support of his assertion. A review of Dr. Myers' testimony shows that the shoulder was not mentioned and that it is unrelated to the injury in question. A review of Dr. Jaramillo's records do not show that there are shoulder problems related to the incident of May 11, 2000 or the injury to the thumb. Although Dr. Jaramillo did treat the Claimant for shoulder problems, Dr. Jaramillo rendered an opinion in the deposition that any shoulder problems are unrelated to the accident (EX 20).

Claimant testified that he had problems with his shoulder prior to the time of his industrial accident (Tr. 41). Claimant testified that he complained of shoulder problems to Dr. Myers, but had no idea why Dr. Myers' medical records do not contain any complaints (Tr. 73). Dr. Myers was provided a history of a hernia and bursitis in the shoulders (EX 1). However, Dr. Myers testified in his deposition that, other than the history, he never received any complaints of shoulder or neck injuries relative to Claimant's thumb injury (EX 19). Additionally, Claimant testified that he began having right shoulder problems in the area of the collar bone *after* he returned to work with the Employer (July 10, 2000) and prior to being laid off on December 21, 2000 (Tr. 77). However, in the questions that followed, the Claimant affirmatively testified to having complained of left and right shoulder pain or symptoms to Dr. Jaramillo prior to the May 11, 2000 work accident (Tr. 77-78).

The record shows sever other incidents that may also have occasioned injury. Claimant testified to being involved in a roll-over accident on June 8, 2000 wherein two vehicles, which were drag racing over a bridge, forced Claimant's vehicle off the road causing him roll over and slide into the river (Tr. 92-93). Claimant was able to extricate himself from the car (Tr. 93). Thereafter, he was treated for injuries to his lumbar, low back, left arm and right hand (Tr. 94). He also had the episode of falling in the bath tub and injuring his left shoulder, neck and right ribs, which resulted in him being treated at the Central Florida Regional Hospital ER (Tr. 91). On June 21, 2000 he had another motor vehicle accident, but he denied that he sustained any injuries from that incident (Tr. 92). And prior to the copmpe3nsible accident he had several other incidents, all of which are competent to produce shoulder pain.

Claimant's testimony as to to prior accidents, injuries and illnesses is very questionable. For instance, Claimant testified that he could not remember the incident on October 26, 1997 where he injured his right shoulder as a result of a falling tree[19] (Tr. 87). Claimant also could not remember a work incident where he injured both shoulders while working at the Disney Yacht and Beach Club on July 7, 1998[20] (TR. 88). When questioned about his June 8, 2000 motor vehicle accident where his car rolled over and off a bridge, Claimant denied injury to his low back, but he did testify that he might have sustained minor injuries to his left arm and right hand as a result of the accident (Tr. 94). Conversely, June 9, 2000 medical records from the emergency room at Central Florida Hospital reveal that Claimant sought treatment for severe pain in his head,

[19] Dr. Jaramillo's medical records for October 29, 1997 provide that Claimant complained of low back pains, right shoulder numbness and pain behind the right shoulder and upper arm as a result of a tree falling on his shoulder (EX 2).

[20] Dr. Jaramillo's medical records for July 7, 1998 confirm that Claimant presented complaints of bilateral shoulder injury, abdominal pain, nervousness, anxiety and muscle spasms in the low back (EX 2).

neck, chest, abdomen and mid- and low-back (EX 4). Additionally, Claimant wavered when testifying about the incident in which he was a victim of an assault on March 6, 2000. After affirming, on cross-examination, that he was mugged and had his wallet stolen, Claimant's testimony took a 180° turn. Specifically, the testimony went as follows:

> Q. Were you assaulted on March 6th of 2000 in the Auto Nation parking lot? Mugged?
> A. Yes.
> Q. Now, this is about two (2) months prior to the accident we are here on today? Is that correct?
> A. If you say like -- I'm -- I'm not sure.
> Q. In fact, two months and a couple days to the date prior to our accident. You were assaulted and your wallet was stolen.
> A. Yes.
> Q. And you had $3,000 in cash in that wallet, right?
> A. A large sum of money.
> Q. You got a couple of black eyes because of that incident?
> A. No.
> Q. Explain to the Court what happened? You were assaulted and mugged by these two women.
> A. What was the date on that?
> Q. March 6th, 2000. Auto Nation parking lot.
> A. I don't -- I really can't remember right now.
> Q. You can't remember what that was about?
> A. No, not right now, I can't.
> Q. You don't recall being mugged?
> A. No.

(Tr. 95, 96).

To the contrary, he provided great detail to Dr. Jaramillo (EX 2). And if he had a preexisting shoulder injury and it was exacerbated and /or aggravated by the compensable accident, it was to the Claimant's benefit to let everyone, especially Dr. Myers and Dr. Jaramillo know, so that he could be treated for the pain he claims to have endured.

More inconsistencies surround Claimant's testimony in regards to his ability to work. For example, Claimant testified that he did not feel that he was physically capable of doing certain types of work (pouring cement) following the May 11, 2000 accident, even if the work did not involve a lot of dexterity (Tr. 74-75). However, after being refreshed of his deposition testimony in which he stated that he felt like he could do such work since July of 2000, Claimant retracted from his initial statement and testified that, as of July of 2000, he could do certain types of work (Tr. 75-76). Another disconcerting example of Claimant's testimony is when he testified that his work at Magann – following the thumb injury – was harder and more labor intensive than when he worked for Peninsula Engineering Construction Company, which required him to climb 300-400 feet in the air on scaffolding (Tr. 128-129). Claimant made such statement despite earlier testifying at hearing that the pile driving job involved mostly signaling and did not involve too much labor intensive work, labor intensive menial, or physical work (Tr. 59). Not only do I find it difficult to believe that signaling a crane operator with one's arm in a sling is more labor intensive

than climbing 300 to 400 feet in the air in order to erect scaffolding, but I also find it troubling that Mr. McGovern again offered inconsistent testimony.

Moreover, Claimant testified that Dr. Jaramillo was seen only for back, neck and shoulder complaints which is clearly not the case.[21] Additionally, the Claimant continually could not recall such incidents where he suffered injuries to his shoulder, neck and back. And most glaring is the Claimant's testimony surrounding his roll-over accident, wherein he denies suffering an injury to his low back. To the contrary, the record shows Mr.McGovern went to the emergency room a day later complaining of severe pain in his head, neck, chest, abdomen and back. Such testimony is clearly inconsistent with the evidence of record. For these reasons, I must completely discount Mr. McGovern's testimony.

The Board has consistently held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case for Section 20(a) invocation. *See* ***Sylvester v. Bethlehem Steel Corp.,*** 14 BRBS 234, 236 (1981), *aff'd sub nom.* ***Sylvester v. Director, OWCP,*** 681 F.2d 359 (5th Cir. 1982). However, the Claimant has failed to establish credible evidence to the physical harm element as required for a *prima facie* case pursuant § 920(a).

Despite having discounted Claimant's testimony, the record contains medical evidence which could establish that the Claimant injured his shoulder as a result of the subject work accident. Section 902(2) of the Act defines an "injury" as an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment. 33 U.S.C. § 902(2). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. ***Preziosi v. Controlled Indus.,*** 22 BRBS 468 (1989); ***Janusziewicz v. Sun Shipbuilding & Dry Dock Co.,*** 22 BRBS 376 (1989)(Decision and Order on Remand); ***Johnson v. Ingalls Shipbuilding Div., Litton Sys.,*** 22 BRBS 160 (1989); ***Madrid v. Coast Marine Constr. Co.,*** 22 BRBS 148 (1989); ***Gardner v. Bath Iron Works Corp.,*** 11 BRBS 556 (1979), *aff'd sub nom.* ***Gardner v. Director, OWCP,*** 640 F.2d 1385 (1st Cir. 1981). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. ***Strachan Shipping v. Nash,*** 782 F.2d 513 (5th Cir. 1986); ***Independent Stevedore Co. v. O'Leary,*** 357 F.2d 812 (9th Cir. 1966); ***Kooley v. Marine Indus. N.W.,*** 22 BRBS 142 (1989); ***Mijangos v. Avondale Shipyards,*** 19 BRBS 15 (1986); ***Rajotte v. General Dynamics Corp.,*** 18 BRBS 85 (1986).

[21] There are medical records in evidence which show that Claimant treated for such injuries with physicians other than Dr. Jaramillo (EX 4).

It is undisputed that the Claimant had pre-existing problems with his shoulders, back and neck[22] (EX 2). However, upon a through review of the medical evidence of record, there is nothing to support Claimant's contention that he developed shoulder problems due to the jerking motion he made when he injured his thumb, nor is anything to support Claimant's assertion that his pre-existing shoulder difficulties worsened as a result of his work accident.

It is significant that there is no mention of shoulder pain in the medical records detailing Claimant's initial treatment at either Port Orange Urgent Care Center or Halifax Medical Center (EX 1, EX 3, EX 5). As for Claimant's follow-up treatment with Dr. Myers, the only mention of shoulder, back and/or neck problems is reflected in Claimant's new patient questionnaire where he provided that he suffered previous injuries to his ribs, back and neck and reported that he has had a hernia and suffers from bursitis in this shoulders (EX 1). Moreover, when questioned about the relationship between Claimant's thumb injury and his alleged shoulder, neck and back injuries, Dr. Myers' testimony went as follows:

> Q. Okay. Thank you. And prior to that, to your knowledge and based on independent recollection or on your medical records, did he complain of any left shoulder or right shoulder problems or pain stemming from the May 11th, 2000 injury?
> A. From my memory and from my records, I have addressed his thumb injury, but I did not have any complaints of shoulder injury relative to the thumb injury.
> Q. And based on your independent recollection and on your medical records, how about any prior complaints of neck pain?
> A. Other than what he wrote in his previous history on the history sheet, in terms of what I was involved with, I have no complaints of neck pain relative to the hand injury.
> Q. Based on your knowledge and your independent recollection as well as your medical records, was there any type of neck pain or shoulder complaints throughout the course of your treatment?
> A. I did not receive any complaints of any neck and shoulder pains. When the patient was seen, that wasn't examined or addressed.
> Q. Doctor, at any point during your treatment of Mr. McGovern, did you feel that Mr. McGovern had either neck pain or shoulder pain which you felt was causally related, with a reasonable degree of medical probability, to the May 11th, 2000 right thumb crush injury?
> A. The only complaints I ever obtained from Mr. McGovern concerning the May 11th, 2000 injury was relative to his right thumb. There were no complaints to any other areas.

(EX 19). Based on the foregoing medical evidence in relation to Claimant's treatment with Dr. Myers, it cannot be concluded that Claimant developed shoulder problems as a result of the work accident, nor can it be concluded that Claimant's pre-existing shoulder problems, as well as neck and back, worsened as a result of the subject accident.

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[22] Dr. Jaramillo, on numerous occasions, diagnosed Claimant as having bursitis in his shoulders, pain in his back, shoulders and neck and muscle spasms and strains (EX 2).

In addition to follow-up treatment with Dr. Myers, the Claimant underwent occupational therapy with Julie Bonamo in the couple months that followed the work accident. According to such occupational therapy medical records, Claimant, at no time during his treatment, mentioned anything about having problems with his shoulder, back and/or neck (EX 6). As such, Claimant's occupational therapy records do not form a basis for concluding that Claimant developed shoulder problems as a result of his work accident, nor do they establish that Claimant's pre-existing shoulder, neck and/or back problems worsened as a result of the work accident.

Looking at the medical records submitted by Dr. Jaramillo, there is nothing in Dr. Jaramillo's records that relate Claimant's shoulder, neck or back problems to his work accident and/or injury (EX 2). Interestingly, Claimant testified that his "shoulder injury is different than before; it's deteriorating; different kind of pain – it's in the muscles; it's not the bursitis; it's not the sharp pain; it's dull and it restricts movement, can't reach, no strength (Tr. 102). However, the medical record from Claimant's final visit, dated December 4, 2001, with Dr. Jaramillo's document the Claimant's pain as sharp, throbbing, shooting and penetrating. Moreover, Dr. Jaramillo diagnosed Claimant as having shoulder bursitis and pain in the low back, neck and shoulder (EX 2).

In order to show that Claimant's shoulder has worsened since his work accident, Claimant's Counsel questioned Dr. Jaramillo in his deposition about the condition of his right shoulder post-accident. Such questioning went as follows:

> Q. Now, on the entry of September 21st, 2000, have you found that entry?
> A. Yes, I have it here.
> Q. I'm going to ask you to jump down five (5) lines if you would from your notes. And would you please tell me if back on that date did he (Claimant) not say that his right shoulder was just as bad as his left shoulder pain?
> A. Yes.
> Q. So, evidently, he felt his right shoulder getting worse?
> A. Yeah. Yeah, his right shoulder is getting worse at that time.
> Q. Now, isn't it true, Doctor, that on January 18th of 2000 -- if you could look at that note.
> A. It is here. Okay.
> Q. If we drop down five (5) lines, at that point he was complaining of left shoulder pain; is that correct?
> A. Right, right.
> Q. And on February 17th, he was complaining of left shoulder pain; is that correct?
> A. February 17th? Yes, left shoulder pain.

(EX 20). It can be taken from the line of questioning that Claimant's Counsel is attempting to establish that Claimant's right shoulder has worsened since his May 11th work accident, to the point where it is in as bad as condition as Claimant's left shoulder. However, a review of Claimant's medical records[23] in

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A history of Claimant's shoulder condition, right and left, is as follows:

- 10/29/97: Complaints included *right* shoulder numbness and pain behind the shoulder blade. Claimed that a tree landed on his shoulder (EX 2). Diagnosed with shoulder contusions (EX 20).

- 7/7/98: Complaints included *both* shoulder joints (EX 2).
- 10/16/98: Complaints included *both* shoulders hurting (EX 2).
- 11/16/98: Complaints included *bilateral* shoulder pain and back pain (EX 2).
- 12/18/98: Complaints included *right* shoulder, right side neck and low back pain and headaches (EX 2).
- 1/21/99: Complaints included *shoulder*, neck and low back pain (EX 2).
- 4/5/99: Complained that *right* shoulder worst and back worst (EX 2).
- 5/7/99: Complaints included *right/left* shoulder pain and right neck pain (EX 2).
- 6/9/99: Complaints of *shoulders* and low back pains (EX 2).
- 7/28/99: Complaints included *bilateral* shoulder pain and low back pain (EX 2).
- 9/3/99: Complaints of low back and *shoulder*pain (EX 2).
- 10/7/99: Complains included *both* shoulder pains, with *left* worse, and low back pains (EX 2).
- 11/11/99: Complaints included *left/right* shoulder pain and neck pain (EX 2).
- 12/17/99: Complaints included *left/right* shoulder pain and low back pain (EX 2).
- 1/18/00: Complaints included *left* shoulder and left neck pain. Diagnosis stated that left shoulder and left neck tendon damage after fall in own tub (EX 2).
- 2/17/00: Complaints included pains in left side of neck and *left* shoulder (EX 2).
- 4/7/00: Complaints included *bilateral* shoulder pain (EX 2).
- 5/10/00: Complaints of pain in *right* shoulder joints. Diagnosed with a *left* shoulder strain (bursitis?) (EX 2).
- 6/12/00: Complaints included *bilateral* shoulder pain, neck stiffness, right thumb and low back pains. Diagnosed with shoulder bursitis (EX 2).
- 7/31/00: Complaints of neck stiffness and pain in the back and joints (EX 2).
- 9/21/00: Complaints included that *right* shoulder hurts just as bad as left shoulder pains, low back pain and headaches (EX 2).
- 10/23/00: Complaints included *left/right* shoulder pain, neck pain and low back pain. Diagnosed with *left/right* shoulder bursitis (EX 2).
- 11/8/00: Complaints of *shoulder*, neck, back and right wrist pain. Diagnosed with cervical and shoulder pain (EX 2).
- 12/1/00: Complaints included headaches, neck pains, *shoulder*pains and back pains (EX 2).
- 1/4/01: Complaints included *right/left* shoulder pain, left low back pain and indigestion (EX 2).
- 2/8/01: Complaints included neck pain and *right/left* shoulder pains (EX 2).
- 3/20/01: Complaints included neck pain, *right/left* shoulder pain, low back pain and right thumb pain. Dr. Jaramillo notes states that Claimant was told his right shoulder pain because right thumb stiffness (EX 2).
- 4/19/01: Complaints included right shoulder pain and pain in right side of upper/lower back and left upper back (EX 2).
- 5/21/01: Complaints of pain in the *shoulders*, neck and low back. Diagnosed with cervical strain and right shoulder strain (EX 2).
- 6/22/01: Complaints included neck, *shoulders* and low back pain (EX 2).
- 7/20/01: Complaints included low back pain, neck pain and shoulder pain (EX 2).
- 9/5/01: Diagnosed with *bilateral* shoulder pain and low back pain (EX 2).
- 10/5/01: Complaints included neck and shoulder pain and headaches. Diagnosed with *bilateral* shoulder strain and cervical strain (EX 2).
- 11/5/01: Complaints included shoulder bursitis, right neck pain and low back pains (EX 2).

full proves that this is not the case. Interestingly, the three (3) dates in which Claimant's Counsel questioned Dr. Jaramillo about happen to be the only three (3) dates in which Claimant complained of left shoulder pain, without complaining of right shoulder pain. Furthermore, Claimant's Counsel fails to provide that, on January 18, 2000, Claimant was diagnosed with left shoulder and left neck tendon damage due to him falling in his own bathtub (EX 2). Apparently such left shoulder pain only lasted a month or so because Claimant went back to complaining of *bilateral* shoulder pain on April 7, 2000 (Id.). In fact, Claimant complained of *bilateral* shoulder pain on the following dates: 7/7/98; 10/16/98; 11/16/98; 5/7/99; 6/9/99; 7/28/99; 10/7/99; 11/11/99; 12/17/99; 4/7/00; 6/12/00; 10/23/00; 1/4/01; 2/8/01; 3/20/01; 5/21/01; 6/22/01; and 9/5/01 (Id.). Additionally, Dr. Jaramillo's records includes a bevy of appointments where Claimant complained of shoulder pain, not favoring either the left or right shoulder. Such dates are as follows: 1/21/99; 9/3/99; 11/8/00; 12/1/00; 7/20/01; 10/5/01; and 11/5/01 (Id.). As noted in Dr. Jaramillo's testimony, Claimant complained that his right shoulder hurt just as bad as his shoulder pains during his September 21, 2000 visit (Id.). However, the same can be deduced for the aforementioned dates when Claimant complained of bilateral shoulder pain or shoulder pain in general. Additionally, Claimant, at his very next visit with Dr. Jaramillo (October 23, 2000), complained of left *and* right shoulder pain to which Dr. Jaramillo diagnosed as bursitis in *both* shoulders (EX 2).

While Dr. Jaramillo testified that Claimant's right shoulder is getting worse at that time (September 21, 2000), I am reluctant to hold this single shred of testimony as sufficient evidence to establish that Claimant's pre-existing shoulder problems worsened as a result of the May 11th accident. First, Dr. Jaramillo, when asked if Mr. McGovern told him that the pile driver or in this accident that he had hurt his shoulder or his back, Dr. Jaramillo, in his deposition, responded "no" (EX 20). Furthermore, Dr. Jaramillo's testimony, by which he states that Claimant's right shoulder is getting worse, is a bald assertion which offers no insight as to whether his condition is tied to the subject work accident. Further reason to not give Dr. Jaramillo's medical opinion full effect is due to his medical background. Dr. Jaramillo testified that he is doctor of internal medicine, with a special licensing in gastroenterology[24], and has been treating Claimant for his internal problems since 1994 (EX 20). On the other hand, Dr. Myers, who is board certified in orthopedics, treated the Claimant at the same time and never reported any problems with Claimant's shoulder, neck and back (EX 19).
Based on the foregoing reasons, I conclude that Claimant's shoulder (right and/or left), neck and back problems are not as a result of the May 11, 2000 work accident, nor have these problems worsened as a result of the said accident. Claimant's treating physician (Dr. Myers) and his occupational therapist (Julie Bonamo) both reported that Claimant had no such problems with his shoulders, neck and/or back (EX 6, EX 16, EX 19). And while Claimant's physician for internal medicine (Dr. Jaramillo) offered testimony that the Claimant's right shoulder was worse at his September 21, 2000 appointment, Dr. Jaramillo failed to provide any dates in order to compare the condition of Claimant's shoulder. Furthermore, there is an overwhelming amount of medical

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- 12/4/01: Complaints included right shoulder bursitis, neck pain and low back pain. Diagnosed with right shoulder bursitis and cervical strain (EX 2).

[24] Dr. Jaramillo testified that he is not currently board certified (EX 20).

evidence detailing Claimant's pre-existing shoulder, neck and back problems[25] (EX 2). However, there is no evidence which ties Claimant's shoulder (right and/or left), back and neck problems to his work accident; nor is there any medical evidence which suggests that these problems have worsened *as a result* of the May 11, 2000 accident in which Claimant injured his right thumb. Therefore, Mr. McGovern's claim for compensation for his alleged shoulder, back and/or neck injuries is hereby denied.

Entitlement to further Impairment Benefits

Claimant, in his Amended LS–18, dated August 17, 2001, lists entitlement to temporary total/temporary partial benefits and loss of earnings and earning capacity as issues to be resolved at formal hearing (ALJ 2). Claimant reiterated the foregoing in his Pre-Hearing Statement, dated April 24, 2002, as issues to be decided at formal hearing (ALJ 3). However, Claimant failed to address these issues at hearing and in his post-hearing brief and as a result has presented no evidence to support such claims.

The Employer/Carrier, on the other hand, argues that the Claimant cannot obtain non-scheduled indemnity benefits under § 908(c)(21) of the Act for any injury to a scheduled body part, thumb or otherwise. Employer/Carrier further argues that it timely paid a § 908(c)(6) scheduled injury, partial permanent disability, in the amount of $525.29 as a result of Dr. Myers' 3% thumb injury rating. Thus, the Employer/Carrier contends that it has no further exposure to workers' compensation liability for loss of wage earning capacity due to Claimant's scheduled right thumb injury.

A review of the medical evidence and the testimony shows that there is no reason to discount the opinion of Dr. Myers, the treating physician. Although the claimant disputes that Dr. Myers is not correct as to whether further impairment benefits, and as a result, temporary total/temporary partial benefits, loss of earnings and earning capacity is appropriate, I do not accord the Claimant 's testimony or position significant weight. Dr. Jaramillo, the Claimant's treating physician, who has no stake in this proceeding, substantiates Dr. Myers' conclusions. And I have noted previously that I do not accept that the claimant's testimony is fully credible. When an injured employee seeks benefits under the Longshore and Harbor Workers' Compensation Act (LWHCA), a treating physician's opinion is entitled to "special" weight. ***Amos v. Director, Office of Workers' Compensation Programs***, 153 F.3d 1051 (9th Cir., 1998); *See also*, ***American Stevedoring Ltd. v. Marinelli***, 248 F.3d 54, (2nd Cir., 2001); ***Lozada v. Director, Office of Workers' Compensation Programs***, U.S. Dept. of 1991 A.M.C. 303 C.A.2,1990; Longshore and Harbor Workers' Compensation Act, §§ 1 et seq. In ***Pietrunti v. Director, Office of Workers' Compensation Programs***, 119 F.3d 1035 (2nd Cir., 1997), an ALJ's findings were reversed by the court because he failed to attribute "great" weight to the opinion of a treating physician. However, I must apply substantial evidence. ***Director v. Newport News Shipbuilding & Dry Dock Co., (Carmines)***, 138 F.3d 134, 140 (4th Cir.1998) states: "[t]he ALJ may not merely credulously accept the assertions of the parties or their representatives, but must examine the logic of their conclusions and evaluate the evidence upon which their conclusions are based." *Id.* To be sufficient, the evidence must be "such relevant evidence as a reasonable mind might

[25] Dr. Jaramillo testified that he had been treating Claimant for back pain and shoulder from October 15, 1998 through May 10, 2000 (EX 20).

accept as adequate to support a conclusion." ***Richardson v. Perales***, 402 U.S. 389, 401, 91 S.Ct. 1420, 1427, 28 L.Ed.2d 842 (1971) (quoting ***Consolidated Edison Co. v. NLRB***, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126 (1938)) (internal quotation marks omitted); ***See v. Washington Metro. Area Transit Auth.***, 36 F.3d 375, 380 (4th Cir.1994).

I accept the position of Dr. Myers that Mr. McGovern reached maximum medical improvement on October 4, 2000, with a three percent (3%) rating of the thumb. According to the record, the Carrier has paid out that rating in the amount of $518.47[26] (CX 10, EX 18). I note that in testimony, Dr Myers vacillated on this point, and I note that Dr. Jaramillo ascribed no permanency, but I accept that the preponderance of the evidence supports Dr. Myers' opinion. The scheduled permanent partial disability rates established by Sections 8(c)(1)-8(c)(20) of the LHCWA are merely the minimum levels of compensation to which the injured employee is automatically entitled as a result of his injury and no proof of actual loss of wage-earning capacity is required in order to receive at least the amount specified in the schedule for such injury. See ***Travelers Ins. Co. v. Cardillo***, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955); ***Greto v. Blakeslee, Arpaia & Chapman***, 10 BRBS 1000 (1979).

Because Claimant was denied compensation for his alleged shoulder, back and neck injuries, he is not entitled to temporary total/temporary partial benefits or loss of earnings and earning capacity for such complaints. If, on the other hand, the Claimant is seeking loss of earnings and earning capacity for his thumb injury, his claim is denied for the following reasons.

Under the Act, compensation for a permanent partial disability must be determined in one (1) of two (2) ways. First, if the injury is of a kind specifically identified in the schedule set forth in 33 U.S.C. §§ 8(c)(1)-(20) of the Act, the injured employee is entitled to receive 2/3 of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired. *See* ***Potomac Electric Power Company v. Director, OWCP,*** 449 U.S. 268, 269 (1980). Second, in all other cases, § 908(c)(21) authorizes compensation equal to 2/3 of the difference between the employee's pre-injury average weekly wages and his post-injury wage-earning capacity, during the period of his disability. 33 U.S.C. § 908(c)(21); ***Potomac Electric Power Company v. Director, OWCP,*** 449 U.S. 268, 269-70 (1980).

The facts herein provide that Claimant suffered an injury to his right thumb while at work for the Employer. And because it is undisputed that the injury to Claimant's thumb is a permanent and partial disability within § 8(c), the Employer made payment pursuant to § 908(c)(6) for Claimant's scheduled injury. In ***Barker v. United States Department of Labor,*** 138 F.3d 431 (1st Cir. 1998), the Court determined that scheduled indemnity benefits to which a claimant is entitled under § 8(c)(1)-(20) are "mutually exclusive" to non-scheduled benefits available under § 908(c)(21). Thus, it would follow that Claimant is not entitled to non-scheduled benefits under § 908(c)(21) for the scheduled injury to his thumb. ***Barker,*** 138 F.3d at 437. Therefore, Claimant's request for benefits for loss of earnings and earning capacity is hereby denied.

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[26] This figure was determined as follows: 3% of the thumb equates to 2.25 weeks of compensation at a rate of $230.43, calculates to a total permanent partial disability/scheduled award in the amount of $518.47 (CX 10, EX 18).

Attorney Fees

Since no application for attorney's fee has been made by the Claimant's counsel, an award of attorney's fees for services to the Claimant cannot be made herein. Counsel for the Claimant is hereby given thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Thereafter, the parties have fifteen (15) days following receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer, **W.F. Magann Corporation,** shall pay the Claimant, Joseph H. McGovern, additional temporary total disability benefits at Claimant's newly calculated average weekly wage ($749.80), less the average weekly wage as previously calculated by the Employer ($345.64), for the period of May 26, 2000 to July 9, 2000.
2. The Employer shall pay the Claimant additional permanent partial disability benefits as set forth above, in paragraph one (1).
3. Employer shall receive a credit for all compensation already paid by Employer/Carrier to Claimant.
4. Claimant's request for interest on back total temporary disability benefits that were paid by the Employer/Carrier is denied.
5. Claimant shall receive interest on the difference between the amount that it should have paid, given my determination concerning the compensation rate, and the amount it previously paid.
6. The District Director shall make all calculations necessary to carry out this order.
7. Claimant's request for a change in First Choice Physician is denied.
8. Claimant's request for compensation for his shoulder, back and neck injuries is denied.
9. As the Claimant is entitled to permanent partial disability, his request for loss of earnings and earning capacity is denied.

10. Jurisdiction is reserved to entertain an attorney's fee petition. Claimant's attorney shall submit, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to appropriate Respondents' counsel who shall then have fifteen (15) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred for those time periods specifically enumerated above.

SO ORDERED.

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Daniel F. Solomon
Administrative Law Judge